

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/STOP PRESS: MENTAL HEALTH ACT 2007

MENTAL HEALTH (

STOP PRESS:

The Mental Health Act 2007 makes provision about mentally disordered persons. The Act received the royal assent on 19 July 2007 and the following provisions came into force on that date: ss 52, 53, 56-59, Sch 10. Section 45 came into force on 24 July 2007: SI 2007/2156. The following provisions came into force on 1 October 2007: ss 19, 20, 39 (in part), 51, Sch 5 (in part) (SI 2007/2635, SI 2007/2798). Section 26 came into force on 1 December 2007 and s 43 came into force on 1 January 2008: SI 2007/2798. The remaining provisions come into force on a day or days to be appointed.

Part 1 (ss 1-47) Amendments to Mental Health Act 1983

Section 1, Sch 1 make provision for the removal of certain categories of mental disorder. Section 2 provides that a person with learning disability is not to be considered by reason of that disability to be suffering from mental disorder unless the disability is associated with abnormally aggressive or seriously irresponsible conduct on his part. Nor is dependence on alcohol or drugs to be considered a disorder or disability of the mind: s 3. Section 4 replaces the 'treatability' and 'care' tests with the appropriate treatment test. Section 5 specifies further cases in which the appropriate treatment test is to apply. Section 6 deals with the appropriate treatment test in relation to certification of a second opinion where treatment requires consent or a second opinion. A change in the definition of 'medical treatment' is provided by s 7. Under s 8, the Secretary of State is required to include in the Mental Health Act Code of Practice a statement of principles that he or she thinks should inform decisions made under the Mental Health Act 1983. The 2007 Act s 10 substitutes references to 'responsible clinician' for references to 'responsible medical officer'. Similar amendments are made, with regard to patients concerned in criminal proceedings, by s 11. Similar amendments are made to provisions regarding consent to treatment by s 12. Section 13 provides a power for an approved clinician to visit and examine a patient for the purposes of a tribunal reference or a tribunal application. A definition of 'approved clinician' is provided by s 14. Section 15 makes consequential amendments to various Acts in order to replace the term 'responsible medical officer' with that of 'responsible clinician'. Section 16 operates so that a registered medical practitioner who is an approved clinician is to be treated as approved for certain purposes. The Secretary of State and the Welsh Ministers are given the power to set out in regulations the circumstances in which approval in England as an approved clinician should be considered to mean approval in Wales as well, and vice versa: s 17. Section 18 makes provision as to the role of approved mental health professionals. Provision is made as to the approval of courses for approved mental health professionals: s 19. Certain codes of practice will continue to apply to social workers when carrying out the functions of an approved mental health professional: s 20. Section 21, Sch 2 bring into effect further amendments in relation to approved mental health professionals. Section 22 deals with conflicts of interest in professional roles.

Section 23 provides an extension of the power to appoint an acting nearest relative. Under s 24, a right to discharge and vary orders appointing a nearest relative is given. A relative's right to apply to a tribunal is restricted by s 25. Section 26 gives a civil partner equal status to a

husband or wife for the purpose of acting as nearest relative. Section 27 concerns the giving of consent by the patient as to whether electro-convulsive therapy is administered. Section 28 makes provision in relation to electro-convulsive therapy where it is required as urgent treatment. Section 29 deals with withdrawal of consent. Under s 30, the appropriate national authority must make such arrangements as it considers reasonable to enable independent mental health advocates to be available to help qualifying patients. With regard to children, hospital managers must ensure that the patient's environment in the hospital is suitable having regard to his age: s 31.

The responsible clinician may by order in writing discharge a detained patient from hospital subject to his being liable to recall: s 32, Schs 3, 4. Section 33 makes provision with regard to the relationship between supervised community treatment and leave of absence. Section 34 makes further provision with regard to consent to treatment in the context of treatment on recall of a community patient or revocation of order. Section 35 regulates the treatment of community patients while in the community. Provisions regarding after-care under supervision are repealed: s 36. Where a patient is absent without leave on the day on which the managers would be required to refer the patient's case to a Mental Health Review Tribunal, that requirement does not apply unless the patient is taken into custody and returns to the hospital where he ought to be or the patient returns himself to the hospital where he ought to be: s 37. Section 38 provides for a Mental Health Review Tribunal for England and for Wales whose purpose is to deal with applications and references by and in respect of patients.

Section 39, Sch 5 deal with cross-border arrangements. The power of the Crown Court to make restriction orders for a limited period is removed: s 40. Section 41 deals with conditionally discharged patients subject to limitation directions.

With regard to the offence of ill-treatment, the maximum penalty on conviction on indictment is increased: s 42. If a patient aged 16 or 17 years who has capacity to consent to the making of arrangements for his admittance to hospital, consents to such arrangements, they may be made, carried out and determined on the basis of that consent even though there are persons who have parental responsibility for him: s 43. Section 44 provides for the transfer of a person detained in a place of safety to another place of safety. Section 45 provides for the delegation of powers of managers of NHS foundation trusts. Section 46 adds a reference to Local Health Boards to the definition of 'the managers' of hospitals. The procedure to be applied when rule-making powers are exercised by the Welsh Ministers is specified by s 47.

Part 2 (ss 48-51) Amendments to other Acts

Section 48, Sch 6 extend the rights of victims under the Domestic Violence, Crime and Victims Act 2004. The 2007 Act s 49 provides exceptions to the requirement in the Mental Capacity Act 2005 to appoint an independent mental capacity advocate. The 2007 Act s 50, Schs 7-9 make it lawful to deprive a person of their liberty in a hospital or care home only if a standard or urgent authorisation is in force or if it is a consequence of giving effect to an order of the Court of Protection on a personal welfare matter. Section 51 makes a minor amendment to the 2005 Act s 20 regarding restrictions on deputies.

Part 3 (ss 52-59) General

Section 53, Sch 10 deal with transitional provision and savings, s 54 makes consequential provisions and s 55, Sch 11 contain repeals and revocations. Sections 56, 57 deal with commencement, s 58 with extent and s 59 with short title.

Amendments, repeals and revocations

Subscribers should note that the list below mentions repeals and amendments which are or will be effective when the Act is fully in force. Please refer to the top of this summary for details of the in-force dates of the provisions of the Act. This information may also be found in the COMMENCEMENT OF STATUTES table in the *Current Service* Noter-up booklet. Please also note that this list is not exhaustive.

Specific provisions of a number of Acts are amended, added or repealed. These include: Mental Health Act 1983 ss 1, 3, 5, 11-12A, 17-17G, 19-21B, 23-26, 29, 30, 32, 34-38, 41, 42, 44, 45A, 45B, 47-58A, 60-68, 72, 73, 75, 76, 78, 79, 114, 114A, 118, 120, 121, 127, 130A-131A, 135, 136, 140, 142A, 142B, 145; Army Act 1955 s 116B; Air Force Act 1955 s 116B; Naval Discipline Act 1957 s 63B; Criminal Procedure (Insanity) Act 1964 s 5A; Armed Forces Act 2006 s 171; Care Standards Act 2000 s 62; Domestic Violence, Crime and Victims Act 2004 ss 36-39, 41A-44B; Mental Capacity Act 2005 ss 4A, 4B, 16A, 20, 40.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/1. INTRODUCTION/(1) TERMINOLOGY/401. Historical development.

1. INTRODUCTION

(1) TERMINOLOGY

401. Historical development.

Since early times a distinction has been recognised in the law between idiots, that is to say natural fools who were incurable and whose lack of capacity was from birth¹, and lunatics², who became insane after birth and whose incapacity was or might be temporary or intermittent³. The expression 'non compos mentis' was used in an old statute of limitation⁴ as a general term, and was approved by Sir Edward Coke as being 'most sure and legal'⁵. The term 'lunatic' was used in the Lunacy Act 1890, which consolidated the previous legislation relating both to care and treatment and to the management of a person's property and affairs⁶. Separate legislative provision was made for 'mental defectives' in the Mental Deficiency Acts 1913 and 1927⁷. In the Mental Treatment Act 1930, the term 'person of unsound mind' was applied to persons formerly described as lunatics⁸. However, the term 'person of unsound mind' was not statutorily defined, and the courts were loath to attempt to define it⁹. The Mental Health Act 1959 replaced the previous legislation dealing with persons of unsound mind and mental defectives and introduced the general term 'mental disorder' to cover all forms of mental ill-health or disability¹⁰. That Act was consolidated, with amendments, in the Mental Health Act 1983¹¹, which is now the principal statute¹². The aim of the Mental Capacity Act 2005¹³, when it comes into force, is to reform and update the law under which decisions on welfare, and property and affairs are made on behalf of incapacitated adults; and, amongst other things, it repeals and replaces Part VII of the Mental Health Act 1983¹⁴ on the management of the property and affairs of patients.

1 In ordinary speech 'idiot' means a person so deficient in mind as to be permanently incapable of rational conduct. A distinction between idiots (ie persons permanently incapable from birth) and other persons was recognised in the statute de Praerogativa Regis (temp incert but generally cited as 17 Edward 2) ch 11, 12 (repealed), whereby the Sovereign had the custody of the land of natural fools: see the *Report of the Royal Commission on the Law relating to Mental Illness and Mental Deficiency 1954-1957* (Cmnd 169 (1957)) PARA 146.

2 The term 'lunatic' was first found in the statute book in 33 Hen 8 c 20 (Attainder and Forfeiture for Treason) (1541) (repealed), and was there applied to those who became insane after birth. It was used by Sir Edward Coke and Sir Matthew Hale as applicable to a person whose insanity was temporary or intermittent: see *Beverley's Case* (1603) 4 Co Rep 123b; Co Litt 247a; 1 Hale PC 34. In 2 & 3 Edw 6 c 8 (Inquisitions of Escheator) (1548) (repealed), 'lunatic' and 'idiot' were used indiscriminately; similarly, in the writ de lunatico inquirendo, 'lunatic' was used to cover all forms of insanity. In the Lunacy Act 1890 (repealed), which was a consolidating Act, 'lunatic' (see s 341 as originally enacted) was defined to mean an idiot or person of unsound mind. In ancient times, 'lunatic' ('lunaticus') described a man who 'hath sometimes his understanding and sometimes not': see *Ex p Cranmer* (1806) 12 Ves 445 per Lord Erskine.

3 Sir Matthew Hale distinguishes three sorts of mental defect or incapacity, namely idiocy, madness and lunacy: 1 Hale PC 29. These three were included in the common term 'dementia'. The first was dementia naturalis, the second and third were dementia accidentalis vel adventitia. 'Madness' denoted incapacity of mind that was complete and permanent, and 'lunacy' denoted an incapacity of mind which was intermittent and interpolated with lucid intervals. However, in 33 Hen 8 c 20 (Attainder and Forfeiture for Treason) (1541) (repealed), 'lunacy' was used as an alternative for madness.

4 23 Eliz 1 c 3 (Fines and Recoveries) (1580-81) s 3 (repealed). The Limitation Act 1980 now uses the term 'of unsound mind': see s 38(2)-(4) (amended by the Mental Health Act 1983 s 148(1), Sch 4 para 55). As from a day to be appointed, in s 38(2) that term is substituted by a reference to lacking capacity (within the meaning

of the Mental Capacity Act 2005) to conduct legal proceedings, and the provisions of the Limitation Act 1980 s 38(3), (4) are omitted: s 38(2)-(4) (prospectively amended by the Mental Capacity Act 2005 s 67, Sch 6 para 25, Sch 7). At the date at which this volume states the law no such day had been appointed.

5 Co Litt 246b; and see *Ex p Barnsley* (1744) 3 Atk 168 at 173 per Lord Hardwicke LC.

6 Lunacy Act 1890 s 98 (repealed). Cf s 90(1) (repealed). For the meaning of 'lunatic' in that Act see note 2 *supra*.

7 Mental defectiveness was defined as 'a condition of arrested or incomplete development of mind existing before the age of 18 years, whether arising from inherent causes or induced by disease or injury'; it consisted of four categories: idiots, imbeciles, feeble-minded persons and moral defectives: Mental Deficiency Act 1913 s 1(2) (repealed); Mental Deficiency Act 1927 s 1 (repealed). See the *Report of the Royal Commission on the Care and Control of the Feeble-minded 1904-1908* (Cd 4202 (1908)); and the *Report of the Royal Commission on Lunacy and Mental Disorders 1924-1926* (Cmd 2700 (1926)).

8 See the Mental Treatment Act 1930 s 20(5) (repealed), whereby 'lunatic' was no longer to be used except eg in the phrase 'criminal lunatic'; and the *Report of the Royal Commission on Lunacy and Mental Disorders 1924-1926* (Cmd 2700 (1926)). Criminal lunatics were subsequently described as 'Broadmoor patients': see the Criminal Justice Act 1948 s 62(2) (repealed). See also *Whysall v Whysall* [1960] P 52 at 62-64, [1959] 3 All ER 389 at 394-395; *Buxton v Jayne* [1960] 2 All ER 688 at 692, 697, [1960] 1 WLR 783 at 788, 795, CA; *Robinson v Robinson (by his guardian)* [1965] P 192, [1964] 3 All ER 232.

9 See eg *Whysall v Whysall* [1960] P 52 at 64-65, [1959] 3 All ER 389 at 395.

10 The Mental Health Act 1959 s 4(1) (repealed) defined 'mental disorder' as 'mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind'. See now the Mental Health Act 1983 s 1(2); and PARA 402 post.

11 For the definition of 'mental disorder' and its various components in the Mental Health Act 1983 see PARAS 402-403 post. For a general review of the Mental Health Act 1983 and the introduction of specific mental capacity legislation to deal with decision-making for those who are incapacitated see PARA 406 post. As to the scope of the Mental Health Act 1983 see *R v Secretary of State for the Home Department, ex p K* [1990] 3 All ER 562, [1991] 1 QB 270, CA. A memorandum was issued at the time of the Mental Health Act 1983 for the guidance of those who work with the Act, and the revised version is 'Mental Health Act 1983: Memorandum on Parts 1 to VI, VIII and X'. See also the Department of Health and Welsh Office Code of Practice (1999); and PARA 436 post.

12 There have been numerous changes in this area since the incorporation into English law by the Human Rights Act 1998 of certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (commonly known as the 'European Convention on Human Rights'): see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq. Other important relevant regional and international instruments include: the United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (1991); and the Council of Europe Recommendation 2004 (10) concerning the Protection of the Human Rights and Dignity of Persons with Mental Disorder.

13 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 post. As to the Mental Capacity Act 2005 generally see PARA 406 post. See also PARAS 595, 641 et seq, 749 et seq post.

14 Ie the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed) (see PARA 671 et seq). As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post.

UPDATE

401 Historical development

NOTE 4--Day now appointed: SI 2007/1897.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/1. INTRODUCTION/(1) TERMINOLOGY/402. Mental disorder.

402. Mental disorder.

'Mental disorder'¹ is defined by the Mental Health Act 1983 for the purposes of the statutory provisions for the care and treatment of mentally disordered persons and the management of their property and affairs, and related matters². This does not affect the general law relating to criminal responsibility³ or to civil capacity, for which the ordinary tests of legal responsibility apply⁴. However, the statutory definition in the Mental Health Act 1983 is sometimes applied by other statutes for their own purposes⁵. 'Mental disorder'⁶ is defined in the Mental Health Act 1983 as mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind⁷. Several provisions relating to the care and treatment of patients are limited to persons suffering from mental illness, severe mental impairment, mental impairment or psychopathic disorder⁸, and some are limited to those suffering from mental illness or severe mental impairment⁹. The terms 'mental illness'¹⁰, 'arrested or incomplete development of mind'¹¹ and 'any other disorder or disability of mind' are not further defined in the statute. Statutory definitions are, however, provided for two forms of arrested or incomplete development of mind, namely 'severe mental impairment' and 'mental impairment', and for 'psychopathic disorder'¹². No one may be dealt with under the Mental Health Act 1983 as suffering from mental disorder by reason only of sexual deviancy or dependence on alcohol or drugs¹³.

1 The adoption of this term was recommended in the *Report of the Royal Commission on the Law relating to Mental Illness and Mental Deficiency 1954-1957* (Cmd 169 (1957)) Pt 3 paras 146-198. The Commission recommended its use as a general term covering all forms of mental ill-health or disability.

2 Mental Health Act 1983 s 1(2), (3). This provision replaces the Mental Health Act 1959 s 4 (repealed). As to the terms which were superseded by the Mental Health Act 1959 see PARA 401 ante.

3 As to the defence of insanity see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 31-33.

4 As to civil capacity generally see PARA 600 et seq post. As to the effect of mental disorder on the holding of a benefice and as to incapacity to present to an advowson see ECCLESIASTICAL LAW vol 14 paras 649-653, 781. As to incapacity to vote at an election see PARA 619 post; and ELECTIONS AND REFERENDUMS vol 15(3) (2007 Reissue) PARA 122. As to the change of domicile of a mentally incapacitated person see PARA 616 post; and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 56.

5 Eg, for the purposes of the law of nullity of marriage, by the Matrimonial Causes Act 1973 s 12(d) (amended by the Mental Health Act 1983 s 148(1), Sch 4 para 34). See MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 332.

6 See the Mental Health Act 1983 ss 1(2), 145(1).

7 The expression 'mentally disordered' must be construed in accordance with the definition of mental disorder: *ibid* s 1(2).

8 Eg *ibid* s 3(2)(a) (compulsory admission to hospital for treatment: see PARA 461 post); s 7(2)(a) (reception into guardianship: see PARA 469 post); s 35(3)(a) (remand to hospital for reports: see PARA 489 post); s 37(2)(a) (hospital and guardianship orders: see PARAS 491, 502 post); s 38(1)(a) (interim hospital orders: see PARA 491 post); s 47(1)(a) (transfer to hospital of persons sentenced to imprisonment: see PARA 535 post).

9 Eg *ibid* s 36(1) (remand to hospital for treatment: see PARA 489 post); s 37(3) (power of magistrates' courts to make hospital or guardianship orders without convicting: see PARA 491 post); s 48(1) (transfer to hospital of remand and civil prisoners: see PARA 536 post).

10 In *W v L* [1974] QB 711 at 719, [1973] 3 All ER 884 at 890, CA, Lawton LJ observed that the words 'mental illness' are ordinary words of the English language: they have no particular medical or legal significance. The

court should construe them, he stated, in accordance with the advice of Lord Reid in *Brutus v Cozens* [1973] AC 854 at 861, [1972] 2 All ER 1297 at 1299, HL, namely, that ordinary words of the English language should be construed in the way that ordinary sensible people would construe them.

11 The Department of Health and Welsh Office Code of Practice (1999) PARA 30.5 states that 'Incomplete or arrested development of mind ... implies that the features that determine the learning disability were present at some stage which permanently prevented the usual maturation of intellectual and social development. It excludes persons whose learning disability derives from accident, injury or illness occurring after that point usually accepted as complete development'. As to the Code of Practice (1999) see PARA 436 post.

12 For the meanings of these terms see PARA 403 post.

13 Mental Health Act 1983 s 1(3). As to the meaning of 'sexual deviancy' see *R v Mental Health Review Tribunal, ex p Clatworthy* [1985] 3 All ER 699; *R v Mental Health Act Commission, ex p W* (1988) Times, 27 May, DC (mental disorder was quite distinct from sexual deviancy and proposed treatment which was solely for the purpose of sexual deviancy was therefore not treatment for mental disorder). See also *W (a patient) v Secretary of State for Scotland* (1999) Times, 21 April.

UPDATE

402 Mental disorder

TEXT AND NOTES 6, 7--'Mental disorder' now defined as any disorder or disability of the mind; and 'mentally disordered' is to be construed accordingly: Mental Health Act 1983 s 1(2) (definitions substituted by Mental Health Act 2007 s 1(2)). A person with learning disability must not be considered by reason of that disability to be (1) suffering from mental disorder for the purposes of the Mental Health Act 1983 ss 3 (see PARAS 460, 461), 7 (see PARAS 469, 481), 17A (see PARA 528A), 20 (see PARAS 461, 469, 518-520), 20A (see PARA 528A), 35-38 (see PARA 486 et seq), 45A (see PARAS 490, 491), 47 (see PARA 535), 48 (see PARA 536), 51 (see PARA 529) and 72(1)(b), (c), (4) (see PARAS 569, 573); or (2) requiring treatment in hospital for mental disorder for the purposes of ss 17E (see PARA 528A), 50-53 (see PARAS 538-541), unless that disability is associated with abnormally aggressive or seriously irresponsible conduct on his part: s 1(2A), (2B) (added by Mental Health Act 2007 s 2(2)). 'Learning disability' means a state of arrested or incomplete development of the mind which includes significant impairment of intelligence and social functioning: Mental Health Act 1983 s 1(4) (added by Mental Health Act 2007 s 2(3)).

TEXT AND NOTE 13--Dependence on alcohol or drugs is not considered to be a disorder or disability of the mind for the purposes of the Mental Health Act 1983 s 1(2): s 1(3) (substituted by Mental Health Act 2007 s 3).

NOTE 13--The effect of the Mental Health Act 1983 s 1(3) is to prevent a condition of psychopathic disorder being found to exist when the abnormally aggressive or seriously irresponsible conduct consequent on the persistent disorder or disability of mind is conduct which is 'solely' a manifestation of sexual deviancy: *R (on the application of MN) v Mental Health Review Tribunal* [2007] All ER (D) 381 (Mar).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/1. INTRODUCTION/(1) TERMINOLOGY/403. Mental impairment and psychopathic disorder.

403. Mental impairment and psychopathic disorder.

For the purposes of the provisions relating to the care and treatment of mentally disordered persons and the management of their property and affairs¹, 'mental impairment' is defined as a state of arrested or incomplete development of mind² (not amounting to severe mental impairment) which includes significant impairment of intelligence³ and social functioning⁴ and is associated with abnormally aggressive⁵ or seriously irresponsible conduct⁶ on the part of the person concerned⁷. 'Severe mental impairment' is defined as a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned⁸. 'Mental impairment' and 'severe mental impairment' replaced the terms 'subnormality'⁹ and 'severe subnormality'¹⁰ used in the previous legislation and introduced the reference to abnormally aggressive or seriously irresponsible conduct. The object was to draw a clearer distinction between mental handicap and the psychiatric disorders for which the care and treatment provisions were thought appropriate.

'Psychopathic disorder' is defined as a persistent disorder or disability of the mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned¹¹.

1 le the provisions of the Mental Health Act 1983: see PARA 402 ante.

2 The Department of Health and Welsh Office Code of Practice (1999) PARA 30.5 gives guidance on the meaning of arrested or incomplete development of mind: see PARA 402 note 11 ante. As to the Code of Practice (1999) see PARA 436 post.

3 The Code of Practice (1999) PARA 30.5 states that the judgment as to the presence of impairment of intelligence must be made on the basis of reliable and careful assessment.

4 The Code of Practice (1999) PARA 30.5 states that evidence of the degree and nature of social competence should be based on reliable and recent observations, preferably from a number of sources such as social workers, nurses and psychologists. Such evidence should include the results of one or more social functioning assessment tests.

5 The Code of Practice (1999) PARA 30.5 states that any assessment of this category should be based on observations of behaviour which lead to a conclusion that the actions are outside the usual range of aggressive behaviour, and which cause actual damage and/or real distress occurring recently or persistently or with excessive severity.

6 The Code of Practice (1999) PARA 30.5 states that an assessment of irresponsible conduct should be based on an observation of behaviour which shows a lack of responsibility, a disregard of the consequences of action taken, and where the results cause actual damage or real distress, either recently or persistently or with excessive severity. Mental impairment associated with seriously irresponsible conduct should be construed restrictively: *Re F (Mental Health Act Guardianship)* [2000] 1 FCR 11, [2000] 1 FLR 192, CA (patient's desire to return home not seriously irresponsible conduct).

7 Mental Health Act 1983 ss 1(2), 145(1).

8 Ibid ss 1(2), 145(1). 'Severe impairment of intelligence and social functioning' are ordinary English words and not terms of art. Severity of impairment is to be measured against the standard of normal persons, not of other handicapped people: *R v Hall* (1987) 86 Cr App Rep 159, CA (construing these words in the definition of 'defective' in the Sexual Offences Act 1956 s 45, for the purposes of s 14(4) (incapacity of defective to consent to assault for purposes of offence of indecent assault upon a woman)). The Sexual Offences Act 1956 ss 14, 45 have been repealed and replaced by new provisions in the Sexual Offences Act 2003: see PARA 769 post.

9 This was defined as a state of arrested or incomplete development of mind (not amounting to severe subnormality) which includes subnormality of intelligence and is of a nature or degree which requires or is susceptible to medical treatment or other special care or training of the patient: see the Mental Health Act 1959 s 4(3) (repealed). The so-called 'treatability' component is now dealt with in the criteria for admission and renewal: see PARAS 461, 491, 520 post.

10 This was defined as a state of arrested or incomplete development of mind which includes subnormality of intelligence and is of such a nature or degree that the patient is incapable of living an independent life or of guarding himself against serious exploitation, or will be so incapable when of an age to do so: see *ibid* s 4(2) (repealed).

11 Mental Health Act 1983 ss 1(2), 145(1). Cf Mental Health Act 1959 s 4(4) (repealed), where the disorder or disability had also to require or be susceptible to medical treatment: this is now dealt with in the criteria for admission or renewal: see PARAS 461, 491, 520 post. A person who suffers from psychopathic disorder may also be mentally ill: *W v L* [1974] QB 711, [1973] 3 All ER 884, CA.

UPDATE

403 Mental impairment and psychopathic disorder

TEXT AND NOTES--Definitions of 'mental impairment', 'severe mental impairment' and 'psychopathic disorder' omitted: Mental Health Act 1983 s 1(2) (amended by Mental Health Act 2007 s 1(3), Sch 11 Pt 1).

NOTE 8--See Violent Crime Reduction Act 2006 s 55 (continuity of sexual offences law).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/1. INTRODUCTION/(2) GENERAL SCHEME OF THE LEGISLATION/404. Former statutory law.

(2) GENERAL SCHEME OF THE LEGISLATION

404. Former statutory law.

Before the Mental Health Act 1959, the Lunacy and Mental Treatment Acts 1890 to 1930¹ provided generally for the reception, care and treatment of the mentally ill (apart from criminal lunatics²) either as voluntary³ or temporary⁴ patients, or as patients detained under reception orders⁵ made by single justices, or orders having the like effect⁶. The Mental Deficiency Acts 1913 to 1938⁷ similarly provided for the reception, care and treatment of the mentally defective⁸ under orders made by judicial authorities⁹, or in certain cases by a court¹⁰, or by the Secretary of State¹¹, or on the written authority of a parent or guardian¹². Criminal lunatics were detained in institutions such as Broadmoor or, if suitable, in mental hospitals on the warrant of the Secretary of State¹³.

The central authority charged with the provision of hospital and specialist services for the mentally ill and mentally defective was (as in the case of the physically ill) the Minister of Health¹⁴. The Board of Control¹⁵, an independent corporate body with certain statutory powers of discharge, was responsible for the visitation¹⁶ of all establishments for mental patients, for the examination of copies of the documents authorising the reception and detention of mental patients¹⁷ and for the periodical review of their cases¹⁸. The board was also the statutory manager of Broadmoor¹⁹ and of the two state institutions for mental defectives of dangerous or violent propensities²⁰. The local health authorities were responsible for providing supervision, training or occupation for the mentally defective in the community and for securing their removal to institutions or to guardianship, where appropriate²¹.

1 The Acts described by this collective title and in force immediately before the coming into force of the Mental Health Act 1959 were the Lunacy Act 1890, the Lunacy Act 1891 (see s 1), the Lunacy Act 1908 (see s 5), the Lunacy Act 1922 (see s 3) and the Mental Treatment Act 1930 (see s 22(1)), all of which were repealed by the Mental Health Act 1959 ss 1, 149(2), Sch 8 Pt I. The repeal of the Mental Treatment Act 1930 s 20 did not affect any amendment made by s 20 (which related to nomenclature) in any enactment not repealed by the Mental Health Act 1959: see the Mental Health Act 1983 s 148(1), Sch 5 paras 29, 30.

2 These were termed 'Broadmoor patients' by the Criminal Justice Act 1948 s 62(2) (repealed); they had been termed 'criminal lunatics' in the Criminal Lunatics Act 1884 s 16 (repealed). As to the powers under the Mental Health Act 1983 of the Secretary of State to transfer prisoners to hospital see PARA 535 et seq post; and as to the power of the courts to order admission to hospital in criminal proceedings see PARA 486 et seq post. As to the current prison system see PRISONS vol 36(2) (Reissue) PARA 501 et seq.

3 Mental Treatment Act 1930 s 1(1) (repealed).

4 Ibid s 5 (repealed).

5 Lunacy Act 1890 ss 4, 6, 16 (repealed).

6 Eg under the Magistrates' Courts Act 1952 s 30(1) (repealed).

7 The Acts described by this collective title were the Mental Deficiency Act 1913, the Mental Deficiency (Amendment) Act 1925, the Mental Deficiency Act 1927 (see s 11) and the Mental Deficiency Act 1938 (see s 2), all of which were repealed by the Mental Health Act 1959 Sch 8 Pt I.

8 As to the meaning of 'defective' see PARA 401 note 7 ante.

9 Mental Deficiency Act 1913 ss 5, 6 (repealed).

10 Ibid s 8(1)(b) (repealed).

11 Ibid s 9 (repealed).

12 Ibid s 3 (repealed).

13 See note 2 supra.

14 National Health Service Act 1946 ss 1, 3(1) (repealed). The minister's functions are now carried out in England by the Secretary of State: see the National Health Service Act 1977 s 1(1); and PARA 410 post. See further HEALTH SERVICES vol 54 (2008) PARA 10 et seq.

15 As to the establishment and reorganisation of the Board of Control see the Mental Deficiency Act 1913 ss 22, 65 (repealed); and the Mental Treatment Act 1930 s 11 (repealed).

16 Lunacy Act 1890 ss 187, 191, 198-200 (repealed); Mental Deficiency Act 1913 s 25 (repealed).

17 See the Lunacy Act 1890 s 34 (repealed); and the Mental Deficiency Act 1913 ss 20, 41 (repealed).

18 Lunacy Act 1890 s 38 (repealed); Lunacy Act 1891 s 7 (repealed); Mental Deficiency Act 1913 s 11 (repealed).

19 Criminal Justice Act 1948 s 62(3) (repealed). Broadmoor became a special hospital, and is now a hospital providing high security psychiatric services: see PARA 418 post.

20 National Health Service Act 1946 s 49(4) (repealed). Rampton and Moss Side (now part of Ashworth hospital) became special hospitals, and are now within the regime of hospitals providing high security psychiatric services: see PARA 418 post.

21 Mental Deficiency Act 1913 s 30 (repealed); Mental Deficiency Act 1927 s 7(2) (repealed); National Health Service Act 1946 ss 50, 51 (repealed).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/1. INTRODUCTION/(2) GENERAL SCHEME OF THE LEGISLATION/405. Origin and territorial scope.

405. Origin and territorial scope.

The Mental Health Act 1959 gave legislative effect to most of the recommendations contained in the report made in 1957 by the Royal Commission appointed to inquire into the then existing law relating to mental illness and mental deficiency¹. The Mental Health Act 1959 was extensively amended by the Mental Health (Amendment) Act 1982, which implemented the proposals made by the government's review of the Mental Health Act 1959². Most of the provisions of the 1959 and 1982 Acts were consolidated in the Mental Health Act 1983³, which is now the principal statute, supplemented as from a day to be appointed⁴ by the provisions of the Mental Capacity Act 2005⁵. No overlap is intended between the Mental Health Act 1983 and the Mental Capacity Act 2005.

Generally, the Mental Health Act 1983 applies only to England⁶ and Wales⁷, and to the Isles of Scilly⁸. However, certain provisions of the Act, relating mainly to the removal and return within the British islands of mentally disordered persons⁹ who are liable to detention under the Act, are specifically extended to Northern Ireland¹⁰; and specific provisions apply to the removal of patients¹¹ to and from the Channel Islands and the Isle of Man¹² and the removal of alien patients to countries outside the United Kingdom, the Isle of Man and the Channel Islands¹³. Certain provisions of the Act apply also to Scotland¹⁴.

¹ See the *Report of the Royal Commission on the Law relating to Mental Illness and Mental Deficiency 1954-1957* (Cmnd 169 (1957)).

² See the White Paper *Review of the Mental Health Act 1959* (Cmnd 7320), which was published in 1978; the changes made were explained in *Reform of Mental Health Legislation* (Cmnd 8405), published in 1981.

³ The provisions of the Mental Health Act 1959 not repealed by the Mental Health Act 1983 include: the Mental Health Act 1959 s 8 (amended by the Charities Act 1972 s 78(2), Sch 7; the Local Government Act 1972 s 195, Sch 23 para 9(1); and the National Health Service Act 1977 s 129, Sch 15 para 24, Sch 6) (functions of welfare authorities); the Mental Health Act 1959 s 131(1) (as amended) (prosecution by local authorities) (see PARA 431 post); s 142 (as amended; prospectively amended) (default powers of minister) (see PARA 410 post); s 144(1) (expenses) (see PARA 410 post); s 145(1) (prospectively amended) (general provisions as to regulations, orders and rules) (see PARA 410 post); s 149(1) (minor and consequential amendments and repeals); s 152 (amended by the Northern Ireland Constitution Act 1973 s 41(1), Sch 6 Pt I; the House of Commons Disqualification Act 1975 s 10(2), Sch 3; the Mental Health (Amendment) Act 1982 s 65(2), Sch 4; and the Mental Health Act 1983 s 148(3), Sch 6) (application to Northern Ireland); and the Mental Health Act 1983 s 154(1) (short title and application to Scilly Isles). The following provisions were not repealed by the Mental Health Act 1983 but have been repealed subsequently: the Mental Health Act 1959 s 9 (repealed) (functions of children authorities); s 128 (repealed) (sexual intercourse with patients) (but see PARA 769 post); s 143 (repealed) (inquiries).

The provisions of the Mental Health (Amendment) Act 1982 not repealed by the Mental Health Act 1983 include: the Mental Health (Amendment) Act 1982 s 34 (amended by the Statute Law (Repeals) Act 2004) (amendments to the Bail Act 1976 etc); the Mental Health (Amendment) Act 1982 s 65 (consequential amendments and repeals); s 67 (expenses) (see PARA 410 post); s 68(1) (interpretation); s 69(1), (6) (transitional provisions); s 70 (amended by the Mental Health Act 1983 s 148, Sch 4 para 61, Sch 6) (short title etc).

The following enactments were also consolidated in the Mental Health Act 1983: the Mental Health Act (Northern Ireland) 1961 Sch 5 paras 1-5; the Criminal Procedure (Insanity) Act 1964 s 4(7); the Administration of Justice Act 1965 Sch 1 (part); the Courts-Martial (Appeals) Act 1968 Sch 4 (part); the Family Law Reform Act 1969 s 12 (not repealed) and Sch 1 (part); the Children and Young Persons Act 1969 Sch 5 paras 38-40; the Administration of Justice Act 1969 ss 17-19; the Local Authority Social Services Act 1970 Sch 1 (prospectively amended) (part); the Courts Act 1971 Sch 8 para 38(a), (b), Sch 9 (part); the Immigration Act 1971 s 30(2) (part); the Local Government Act 1972 Sch 23 para 9(1) (part), (2) (part), (4)-(6); the Guardianship Act 1973 s 1(8) (part); the Nursing Homes Act 1975 Sch 1 paras 1-3, 147; the Criminal Law Act 1977 s 32 (not repealed), Sch 6 (part); the National Health Service Act 1977 s 105(3) (part), Sch 15 paras 23, 26-28, 30-31, 32 (not repealed), 33; the Child Care Act 1980 Sch 5 paras 13, 14; the Magistrates' Courts Act 1980 s 32(2) (not

repealed), Sch 7 paras 31, 32; the Health Services Act 1980 Sch 1 para 13; the Forgery and Counterfeiting Act 1981 s 11(1); the Supreme Court Act 1981 s 144, Sch 5 (part), Sch 6 para 4; and the British Nationality Act 1981 s 39(7) (part).

Provision is made for the repeal or amendment of any local enactment so far as appears to be necessary in consequence of the Mental Health Act 1983: see s 144.

4 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 post. As to the Mental Capacity Act 2005 generally see PARA 406 post.

5 The Mental Capacity Act 2005 has its origin in the *Report on Mental Incapacity* (Law Com no 231) (1995). This report was followed by a policy statement 'Making Decisions' (1999), and then the publication of a draft Mental Incapacity Bill and accompanying notes ((Cm 5859-I, II) (2003)). The Bill was subjected to scrutiny by a Joint Committee of both Houses of Parliament which published its report in November 2003 (HL Paper (2002-03) no 189-I; HC Paper (2002-03) no 1083-I), and the government's response to this report was presented to Parliament in February 2004 ((Cm 6121) (2004)). The Bill was renamed and introduced into Parliament as the Mental Capacity Bill in June 2004, and it received Royal Assent on 7 April 2005.

6 'England' means, subject to any alteration of boundaries of local government areas, the area consisting of the counties established by the Local Government Act 1972 s 1 (see LOCAL GOVERNMENT vol 69 (2009) PARA 24), Greater London and the Isles of Scilly: Interpretation Act 1978 s 5, Sch 1. As to local government areas see LOCAL GOVERNMENT vol 69 (2009) PARA 24 et seq; and as to boundary changes see LOCAL GOVERNMENT vol 69 (2009) PARA 56 et seq. As to Greater London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 29.

7 As to the transfer of certain ministerial functions under the Mental Health Act 1959, the Mental Health Act 1983 and other legislation to the National Assembly of Wales in so far as they are exercisable in relation to Wales see PARA 411 post. 'Wales' means the combined area of the counties which were created by the Local Government Act 1972 s 20 (as originally enacted) (see LOCAL GOVERNMENT vol 69 (2009) PARA 37), but subject to any alteration made under s 73 (as amended) (consequential alteration of boundary following alteration of watercourse) (see LOCAL GOVERNMENT vol 69 (2009) PARA 90): Interpretation Act 1978 Sch 1 (definition substituted by the Local Government (Wales) Act 1994 s 1(3), Sch 2 para 9).

8 See the Mental Health Act 1983 s 149(4). The Isles of Scilly (Mental Health) Order 1985, SI 1985/149, made under the National Health Service Act 1977 s 130(4), extended the Mental Health Act 1983 to the Isles of Scilly from 12 March 1985, with the modification that the expression 'local social services authority' in the Mental Health Act 1983, in relation to the Isles, means the Council of the Isles of Scilly.

9 As to removal and return between Northern Ireland and England and Wales see PARAS 507, 509-510, 544-545 post. For the meaning of 'mentally disordered' see PARA 402 ante.

10 See the Mental Health Act 1983 s 147. The relevant provisions are: ss 81-82 (as amended) (see PARAS 544-545 post), s 86 (as amended) (see PARA 548 post), s 87 (as amended) (see PARA 509 post), s 88 (as amended) (see PARA 507 post) (and, so far as applied by s 88 (as amended), s 18 (as amended) (see PARA 507 post), s 22 (as amended) (see PARA 522 post) and s 138 (see PARA 447 post)), s 104(4) (prospectively amended) (see PARA 732 post), s 110 (as amended) (see PARAS 744-745 post) (and so much of Pt VII (ss 93-113) (as amended; prospectively amended and repealed) (see PARA 671 et seq post) as is applied in relation to Northern Ireland by s 110 (as amended)), s 128 (see PARAS 770-771 post) (except as it relates to patients subject to guardianship), s 137 (see PARA 446 post), s 139 (as amended) (see PARA 407 post), s 141 (as amended) (see PARA 445 post), s 142 (as amended) (see PARA 628 post), s 143 (as amended; prospectively amended) (see PARA 410 post) (so far as applicable to any Order in Council extending to Northern Ireland) and s 144 (see note 3 supra): see s 147. As from a day to be appointed, s 147 is amended by the omission of the reference to s 104(4), s 110 (as amended; prospectively repealed) (see PARAS 744-745 post) and so much of Pt VII (as amended; prospectively amended and repealed) as is applied in relation to Northern Ireland: s 147 (prospectively amended by the Mental Capacity Act 2005 s 167, Sch 6 para 29(1), (9), Sch 7). At the date at which this volume states the law no such day had been appointed. As to the Mental Capacity Act 2005 generally see PARA 406 post.

11 For the meaning of 'patient' see PARA 435 post.

12 See the Mental Health Act 1983 ss 83-85 (as amended), ss 88-89 (as amended); and PARAS 507, 509, 546-547 post.

13 See *ibid* s 86 (as amended); and PARA 548 post.

14 See *ibid* s 146. As from a day to be appointed, s 146 is amended by the omission of the reference to s 104(4), s 110 (as amended; prospectively repealed) (see PARAS 744-745 post) and so much of Pt VII (as amended; prospectively amended and repealed) as is applied in relation to Scotland: s 146 (prospectively amended by the Mental Capacity Act 2005 s 167, Sch 6 para 29(1), (8), Sch 7). As to moving patients from or to

Scotland see also the Mental Health (Care and Treatment) (Scotland) Act 2003; and the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9).

UPDATE

405 Origin and territorial scope

NOTE 3--Mental Health Act 1959 s 8 further amended: National Health Service (Consequential Provisions) Act 2006 Sch 1 para 23. Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/1. INTRODUCTION/(2) GENERAL SCHEME OF THE LEGISLATION/406. General overview of the legislation.

406. General overview of the legislation.

The Mental Health Act 1983 prescribes a single code under which patients¹ suffering from mental disorder² may be compulsorily admitted to and detained in³ any hospital⁴ or a registered establishment⁵ or received into the guardianship⁶ of a local social services authority⁷ or other person⁸. The Act also provides for courts in criminal proceedings to make orders for admission to hospital or guardianship orders in respect of people suffering from certain forms of mental disorder⁹ and for the Secretary of State¹⁰ to transfer to hospital certain prisoners and other persons liable to be detained¹¹. There are mental health review tribunals¹², for the purpose of dealing with applications and references¹³ by and in respect of patients under the provisions of the Act¹⁴, with two tribunal regions for England¹⁵ (north and south) and one for Wales¹⁶. Provision is also made, inter alia, for the temporary removal of people suffering or believed to be suffering from mental disorder to a place of safety¹⁷; for the removal and return of patients within the United Kingdom¹⁸ and abroad¹⁹; for certain functions of local social services authorities²⁰, primary care trusts and health authorities²¹, hospital managers and registered establishments²², and the Secretary of State²³; and for offences²⁴.

The Mental Health Act 1983 expressly declares that nothing in its terms is to be construed as preventing a patient who requires treatment for mental disorder from being admitted to, or remaining in, any hospital or registered establishment by arrangement and without any application, order or direction rendering him liable to be detained under the Act²⁵. Such patients are known as 'informal' patients.

The Mental Health Act 1983 also makes provision for the management of the property and affairs of patients²⁶. For this purpose, the term 'patient' is limited to a person found to be incapable by reason of mental disorder²⁷ of managing and administering his property and affairs²⁸.

Provision for these matters was originally contained in the Mental Health Act 1959, which was then amended and largely consolidated in the Mental Health Act 1983²⁹.

The Mental Health Act 1983 also contains provisions as to the circumstances in which the patient's consent to treatment is or is not necessary³⁰, for the establishment and functions of the Mental Health Act Commission³¹, and for the after-care of detained patients³². A code of practice must be prepared by the Secretary of State³³, after consulting such bodies as appear to him to be concerned³⁴, and the code must be laid before Parliament³⁵ and published³⁶.

The Board of Control was abolished by the Mental Health Act 1959³⁷, and that Act extended to mentally disordered people the benefit of other provisions³⁸ relating to the treatment and care of elderly, sick or disabled people outside hospital. The national health service has a duty to provide such facilities for the prevention of illness (including mental disorder), and for the care and after-care of persons who are or have been suffering from illness, as are considered appropriate as part of the health service³⁹. Local social services authorities also have a duty to provide facilities for the same purpose, together with other powers and duties to provide or arrange social services for elderly, sick and disabled people, including the mentally disordered⁴⁰. In the Mental Health Act 1983 there are also now provisions for the supervision of certain patients once they leave hospital⁴¹. Private or charitable establishments providing accommodation and care for mentally disordered people are subject to the provisions of the Care Standards Act 2000 relating to registration, inspection and conduct of registered establishments under that Act⁴².

As from a day to be appointed⁴³, the Mental Capacity Act 2005 reforms, updates and codifies⁴⁴ the law under which decisions are to be made on behalf of adults, both where they lose mental capacity at some point in their lives and where they have been incapacitated since birth. Part 1 of the Act⁴⁵ has provisions defining 'persons who lack capacity'⁴⁶. It contains a set of principles⁴⁷ and a checklist to be used in ascertaining a person's best interests⁴⁸. There are provisions dealing with liability for actions in connection with the care and treatment of a person who lacks capacity to consent to what is done⁴⁹. A new statutory scheme is established for lasting powers of attorney which may extend to personal welfare matters⁵⁰. There are provisions setting out the jurisdiction of the new Court of Protection to make declarations⁵¹, and to make decisions and appoint substitute decision-makers ('deputies') where a person lacks capacity⁵². Part 1 of the Act also sets out rules on advance decisions to refuse medical treatment⁵³, decisions which cannot be made by another person on behalf of the person lacking capacity⁵⁴, and research involving people who lack capacity⁵⁵; and it establishes a system for providing independent consultees for particularly vulnerable people⁵⁶. A new criminal offence of neglect or ill-treatment is created⁵⁷. Provision is made for codes of practice to give guidance about the legislation⁵⁸. Part 2 of the Act⁵⁹ deals with the Court of Protection (which is a new superior court of record), its judges and procedures⁶⁰; and it also establishes a new statutory official, the Public Guardian, to support the work of the court⁶¹, and makes provision for Court of Protection Visitors⁶². The Act does not affect the law relating to murder, manslaughter or assisted suicide⁶³. It makes provision as to the private international law of England and Wales in relation to persons who cannot protect their interests, governing which jurisdiction should apply when a national of one country is in another state⁶⁴. The Act makes minor and consequential amendments to existing legislation⁶⁵ and repeals certain legislation⁶⁶, in particular Part VII of the Mental Health Act 1983 and the Enduring Powers of Attorneys Act 1985⁶⁷. The Mental Capacity Act 2005 is to be supplemented by subordinate legislation⁶⁸, including new Court of Protection Rules⁶⁹.

Under both the Mental Health Act 1983 and the Mental Capacity Act 2005, the effects of the Human Rights Act 1998 and the European Convention on Human Rights must also be considered⁷⁰.

1 For all purposes apart from the management of a person's property and affairs under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed), a 'patient' is a person suffering or believed to be suffering from mental disorder: see s 145(1); and PARA 435 post.

2 For the definition of 'mental disorder' see PARA 402 ante.

3 Under the Mental Health Act 1983 Pt II (ss 2-34) (as amended): see PARA 460 et seq post.

4 For the meaning of 'hospital' see PARA 417 post.

5 As to registered establishments see PARA 421 post; and SOCIAL SERVICES AND COMMUNITY CARE.

6 See the Mental Health Act 1983 ss 7-8; and PARA 469 et seq post.

7 For the meaning of 'local social services authority' see PARA 424 post.

8 See the Mental Health Act 1983 Pt II (as amended); and PARA 435 et seq post.

9 For the meaning of 'mental disorder' and its various forms see PARAS 402-403 ante.

10 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 post. As to the transfer of certain ministerial functions under the Mental Health Act 1959, the Mental Health Act 1983 and other legislation to the National Assembly of Wales in so far as they are exercisable in relation to Wales see PARA 411 post. For the meaning of 'Wales' see PARA 405 note 7 ante.

11 See the Mental Health Act 1983 Pt III (ss 35-55) (as amended); and PARAS 486-505, 535-541 post.

12 As to mental health review tribunals see the Mental Health Act 1983 Pt V (ss 65-79) (as amended); and PARA 560 et seq post.

- 13 As to such applications and references see PARA 564 et seq post.
- 14 See the Mental Health Act 1983 s 65(1) (as substituted); and PARA 560 post.
- 15 For the meaning of 'England' see PARA 405 note 6 ante.
- 16 See the Mental Health Act 1983 s 65(1A) (as added); and PARA 560 post.
- 17 See ibid ss 135-136 (as amended); and PARAS 549-550 post.
- 18 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706, preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Channel Islands nor the Isle of Man are within the United Kingdom. See further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 3.
- 19 See the Mental Health Act 1983 Pt VI (ss 80-92) (as amended); and PARAS 507-509, 542-548 post.
- 20 See ibid ss 114-117 (as amended); and PARA 424 et seq post.
- 21 See ibid ss 117, 140 (as amended); and PARAS 414, 416 post. For the meanings of 'primary care trust' and 'health authority' see PARA 414 note 6 post.
- 22 See ibid ss 132-134 (as amended); and PARAS 440, 443, 523 post. For the meaning of hospital 'managers', and as to their functions, see PARA 439 post; and for the meaning of 'registered establishment' see PARA 421 post.
- 23 See ibid ss 118-123 (as amended); and PARA 410 et seq post.
- 24 See ibid Pt IX (ss 126-130) (as amended); and PARA 765 et seq post.
- 25 See ibid s 131(1) (as amended); and PARA 437 post.
- 26 See ibid Pt VII (as amended; prospectively amended and repealed); and PARA 671 et seq post.
- 27 For the definition of 'mental disorder' see PARA 402 ante.
- 28 See the Mental Health Act 1983 s 94(2) (prospectively repealed). For all other purposes of the Act, the term refers to a person suffering or believed to be suffering from mental disorder: see s 145(1); and PARA 435 post. As to the test for capacity and the burden of proof see *Masterman-Lister v Brutton & Co*, *Masterman-Lister v Jewell* [2002] EWCA Civ 1889, [2003] 3 All ER 162, [2003] 1 WLR 1511; and see PARA 681 note 6 post.
- 29 See PARA 405 ante.
- 30 See the Mental Health Act 1983 Pt IV (ss 56-64) (as amended); and PARAS 551-558 post.
- 31 See ibid s 121 (as amended); and PARA 413 post.
- 32 See ibid s 117 (as amended); and PARAS 414, 428 post. As to the after-care under supervision of certain patients once they leave hospital see the text to note 41 infra; and PARAS 528-534 post.
- 33 See ibid s 118(1), (2) (as amended); and PARAS 410, 436 post.
- 34 Ibid s 118(3).
- 35 Ibid s 118(4), (5).
- 36 Ibid s 118(6). See Department of Health and Welsh Office Code of Practice (1999); and PARA 436 post.
- 37 See PARA 404 ante.
- 38 The provisions then contained in the National Health Service Act 1946 and the National Assistance Act 1948, but now mostly superseded by other legislation: see PARAS 414, 425-426 post.
- 39 National Health Service Act 1977 s 3(1)(e). See PARA 414 post; and HEALTH SERVICES vol 54 (2008) PARA 10 et seq.

40 See PARAS 425-426 post; and SOCIAL SERVICES AND COMMUNITY CARE. There is also a duty to appoint approved social workers to carry out various functions under the Mental Health Act 1983: see s 114; and PARAS 427, 450-451 post.

41 See *ibid* ss 25A-25J (as added and amended); and PARAS 528-534 post.

42 As to registered establishments see PARA 421 post; and SOCIAL SERVICES AND COMMUNITY CARE.

43 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. The Mental Capacity Act 2005, other than ss 30-41 (see PARAS 659-670 post), is to come into force in accordance with provision made by order by the Lord Chancellor: s 68(1). Sections 30-41 are to come into force in accordance with provision made by order by: (1) the Secretary of State, in relation to England; and (2) the National Assembly for Wales, in relation to Wales: s 68(2). An order under s 68 may appoint different days for different provisions and different purposes: s 68(3). Subject to the provisions of s 68(5), (6), the Mental Capacity Act 2005 extends to England and Wales only: s 68(4). The following provisions extend to the United Kingdom: (a) Sch 1 para 16(1) (evidence of instruments and of registration of lasting powers of attorney) (see PARA 648 post; and AGENCY vol 1 (2008) PARA 232); Sch 4 para 15(3) (evidence of instruments and of registration of enduring powers of attorney) (see PARA 647 post; and AGENCY vol 1 (2008) PARA 231): s 68(5). As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 post. Subject to any provision made in Sch 6 (see note 65 *infra*), the amendments and repeals made by Schs 6, 7 (see notes 65, 66 *infra*) have the same extent as the enactments to which they relate: s 68(6).

44 The Mental Capacity Act 2005 places on a statutory footing many of the developments of the common law in relation to treatment and welfare of those who are incapacitated and their best interests, and advance decisions refusing medical treatment. As to the broader scheme of the Act and its relationship with the common law and the Mental Health Act 1983 see PARA 595 post.

45 *Ie* the Mental Capacity Act 2005 Pt 1 (ss 1-44).

46 See *ibid* ss 2, 3; and PARA 641 note 3 post.

47 See *ibid* s 1; and PARA 641 post.

48 See *ibid* s 4; and PARA 642 post.

49 See *ibid* ss 5-8; and PARAS 643-644 post.

50 See *ibid* ss 9-14; and PARAS 647-651 post. See also AGENCY vol 1 (2008) PARA 217 *et seq*.

51 See *ibid* s 15; and PARA 756 post. As to the Court of Protection under the Mental Capacity Act 2005 see the text and note 60 *infra*; and PARA 750 post.

52 See *ibid* ss 16-21; and PARAS 757-760 post.

53 See *ibid* ss 24-26; and PARAS 652-655 post.

54 See *ibid* ss 27-29; and PARAS 656-658 post.

55 See *ibid* ss 30-34; and PARAS 659-662 post.

56 See *ibid* ss 35-41; and PARAS 663-670 post.

57 See *ibid* s 44; and PARA 768 post.

58 See *ibid* ss 42-43; and PARAS 645-646 post.

59 *Ie* *ibid* Pt 2 (ss 45-61).

60 See *ibid* ss 45-56; and PARAS 750-755 post.

61 See *ibid* ss 57-60; and PARAS 761-763 post.

62 See *ibid* s 61; and PARA 764 post.

63 For the avoidance of doubt, it is declared that nothing in the Mental Capacity Act 2005 is to be taken to affect the law relating to murder (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 89 *et seq*) or manslaughter (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 92 *et seq*) or the

operation of the Suicide Act 1961 s 2 (as amended) (assisting suicide) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 106): see the Mental Capacity Act 2005 s 62.

64 See *ibid* s 63; and PARA 408 post.

65 See *ibid* s 67(1), Sch 6.

66 See *ibid* s 67(2), Sch 7. The Lord Chancellor may by order make supplementary, incidental, consequential, transitional or saving provision for the purposes of, in consequence of, or for giving full effect to a provision of the Mental Capacity Act 2005: s 67(3). An order under s 67(3) may in particular: (1) provide for a provision of the Mental Capacity Act 2005 which comes into force before another provision of the Act has come into force to have effect, until the other provision has come into force, with specified modifications; (2) amend, repeal or revoke an enactment, other than one contained in an Act or Measure passed in a session after the one in which the Mental Capacity Act 2005 is passed: s 67(4). The amendments that may be made under head (2) *supra* are in addition to those made by or under any other provision of the Mental Capacity Act 2005: s 67(5). An order under s 67(3) which amends or repeals a provision of an Act or Measure may not be made unless a draft has been laid before and approved by resolution of each House of Parliament: s 67(6). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq. As to Parliament generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 201 et seq; PARLIAMENT vol 78 (2010) PARA 1 et seq.

67 As to the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) see PARA 671 et seq post. As to the Enduring Powers of Attorney Act 1985 see PARAS 599, 673 post; and AGENCY vol 1 (2008) PARA 194 et seq.

The Mental Health Act Pt VII (as amended; prospectively amended and repealed) and the Enduring Powers of Attorney Act 1985 cease to have effect from a day to be appointed: see the Mental Capacity Act 2005 s 66(1). See note 43 *supra*. However, specific provision is made for transitional provisions and savings in regard to the Mental Health Act Pt VII (as amended; prospectively amended and repealed) (see the Mental Capacity Act 2005 s 66(4), Sch 5 Pt 1) and the Enduring Powers of Attorney Act 1985 (see the Mental Capacity Act 2005 Sch 5 Pt 2; and PARA 647 post). Schedule 5 Pt 1 sets out provisions for enabling a receiver appointed under the Mental Health Act 1983 s 99 (prospectively repealed) (see PARA 704 et seq post) to continue in certain circumstances, where he is such a receiver immediately before the day on which the repeal of the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) takes effect: Mental Capacity Act 2005 Sch 5 para 1(1). On and after that day the Mental Capacity Act 2005 applies as if any receiver for the person were in fact a deputy (see PARA 760 post) appointed in relation to the person, but only with the functions he had as receiver: see Sch 5 para 1(2). As to relevant applications, powers and related matters see also Sch 5 para 1(3)-(9). There are also provisions on continuing orders, appointments etc (see Sch 5 para 2); pending proceedings (see Sch 5 para 3); pending appeals (see Sch 5 para 4); unpaid fees (see Sch 5 para 4); the treatment of court records (see Sch 5 para 5); the effect on existing charges (see Sch 5 para 6); the preservation of interests on disposal of property (see Sch 5 para 7); and the rendering of accounts (see Sch 5 para 8).

68 As to the power to make subordinate legislation see *ibid* s 65. Any power to make rules, regulations or orders under the Mental Capacity Act 2005: (1) is exercisable by statutory instrument; (2) includes power to make supplementary, incidental, consequential, transitional or saving provision; (3) includes power to make different provision for different cases: s 65(1). Any statutory instrument containing rules, regulations or orders made by the Lord Chancellor or the Secretary of State under the Mental Capacity Act 2005, other than: (a) regulations under s 34 (loss of capacity during research project) (see PARA 659 post); (b) regulations under s 41 (adjusting role of independent mental capacity advocacy service) (see PARA 670 post); (c) regulations under Sch 3 para 32(1)(b) (private international law relating to the protection of adults) (see note 64 *supra*; and PARA 408 post); (d) an order of the kind mentioned in s 67(6) (consequential amendments of primary legislation) (see note 66 *supra*); or (e) an order under s 68 (commencement) (see note 43 *supra*), is subject to annulment in pursuance of a resolution of either House of Parliament: s 65(2). A statutory instrument containing an Order in Council under Sch 3 para 31 (provision to give further effect to Hague Convention) (see note 64 *supra*; and PARA 408 post) is subject to annulment in pursuance of a resolution of either House of Parliament: s 65(3). A statutory instrument containing regulations made by the Secretary of State under s 34 (see PARA 659 post) or s 41 (see PARA 670 post) or by the Lord Chancellor under Sch 3 para 32(1)(b) (see note 64 *supra*; and PARA 408 post) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament: s 65(4).

69 See *ibid* s 51; and PARA 752 post.

70 See PARA 401 note 12 ante.

UPDATE

406 General overview of the legislation

TEXT AND NOTE 31--Mental Health Act 1983 s 121 repealed: Health and Social Care Act 2008 s 52(4), Sch 15 Pt 1.

NOTE 41--Mental Health Act 1983 ss 25A-25J replaced by ss 17A-17G: see PARA 528A.

NOTE 43--All provisions of Mental Capacity Act 2005 in force by 1 October 2008: SI 2006/2814 (amended by SI 2006/3473), SI 2007/563, SI 2007/856, SI 2007/1897.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/1. INTRODUCTION/(2) GENERAL SCHEME OF THE LEGISLATION/407. Protection for acts done in pursuance of the Mental Health Act 1983.

407. Protection for acts done in pursuance of the Mental Health Act 1983.

No person is to be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings to which he otherwise would have been liable in respect of any act purporting to be done in pursuance of the Mental Health Act 1983 or any regulations or rules made under the Act¹ unless the act in question was done in bad faith or without reasonable care². Similar protection is extended to the authority having jurisdiction under Part VII of the Mental Health Act 1983³ when discharging functions under any other enactment⁴. Before any civil proceedings are taken against any person so acting, the leave of the High Court must be obtained⁵, and no criminal proceedings may be brought against any person in any court in respect of any such act except by or with the consent of the Director of Public Prosecutions⁶.

The test to be applied by the court is whether the complaint appears to be such that it deserves the further investigation which would only be possible if the case were allowed to proceed⁷. The Court of Appeal has jurisdiction to hear appeals against the granting or refusal of leave by the High Court to the taking of proceedings⁸, but no appeal lies to the House of Lords from the refusal by the Court of Appeal of leave to appeal to that House⁹. The protection provided does not prevent the High Court from entertaining an application for judicial review in respect of an act done in pursuance of the Mental Health Act 1983¹⁰.

The statutory protection does not apply to proceedings for an offence under the Mental Health Act 1983 to which the consent of the Director of Public Prosecutions is required¹¹, nor does it apply to proceedings against the Secretary of State, the National Assembly for Wales, a strategic health authority, a health authority, a special health authority, a primary care trust, an NHS trust¹² or an NHS foundation trust¹³.

1 See eg *Ashingdane v Secretary of State for Social Services* (18 February 1980, unreported) (the decision of a nurses' union not to allow patients who were subject to restriction orders to be transferred to a particular hospital was a policy decision which fell outside the express or implied authority as conferred by the Mental Health Act 1959). However, the provision is not limited to acts done, or purported to be done, in pursuance of functions specifically provided for in the terms of the Act itself: *Pountney v Griffiths* [1976] AC 314, [1975] 2 All ER 881, HL (returning a detained patient to his ward at the end of visiting time was an act in pursuance of the Mental Health Act 1959). Nevertheless, it does not apply to proceedings instituted by informal patients: *R v Runighian* [1977] Crim LR 361. See also *R v Broadmoor and Secretary of State for the Home Department, ex p S, H and D* CO/199/98, CA; *R v Mental Health Act Commission, ex p Smith* (1998) 43 BMLR 174; *Broadmoor Hospital Authority v R* [2000] 2 All ER 727, [2000] 1 WLR 1590; *R (on the application of E) v Ashworth Hospital Authority* [2001] EWHC 1089 (Admin), (2002) Times, 17 January; *R (on the application of A) v Secretary of State for the Home Department* [2003] EWCA Civ 2846; *R (on the application of Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, [2005] All ER (D) 139 (Oct).

2 Mental Health Act 1983 s 139(1). See also the text and notes 3-4 *infra*. This provision extends to Scotland: see s 146 (prospectively amended); and PARA 405 *ante*.

As to liability for lack of reasonable care see *Everett v Griffiths* [1921] 1 AC 631, HL (action for false imprisonment by reason of negligent certification); *Harnett v Fisher* [1927] AC 573, HL. See also *Harnett v Bond* [1925] AC 669, HL (negligently retaking while on leave of absence); *Re Frost* [1936] 2 All ER 182, CA (leave granted to sue for negligence in improperly taking patient to hospital); *Holgate v Lancashire Mental Hospitals Board, Gill and Robertson* [1937] 4 All ER 19 (negligence in granting licence for absence); *Kynaston v Secretary of State for Home Affairs* (1981) 73 Cr App Rep 281, CA (where the Home Secretary acted on the advice of a board, he had not acted in bad faith or without reasonable care).

A medical practitioner who under the statutes formerly in force undertook the duty of signing a certificate of insanity was under a duty to use reasonable care; if he failed to do so, damages might be recovered against

him by the person to whom the certificate related: *Hall v Semple* (1862) 3 F & F 337 (action for assault and false imprisonment by reason of negligent certification); *Everett v Griffiths* supra (where it was assumed, but not decided, that there was a duty to use reasonable care in certifications); *Harnett v Fisher* supra (action on similar grounds, where the House of Lords, Lord Blanesburgh dissenting, considered that the duty arose, not under the statute, but at common law); *De Freville v Dill* (1927) 96 LJB 1056 (action on similar grounds). In *Harnett v Fisher* supra, the giving of a certificate of insanity under the Lunacy Act 1890 s 4 (repealed) was held to be a direct cause of the subsequent reception order and detention. It would seem that the making of a medical recommendation for the purposes of an application for compulsory admission and detention under the Mental Health Act 1983 Pt II (ss 2-34) (as amended) (see PARA 482 post) would be similarly regarded, and that the duty to exercise reasonable care in the making of such a recommendation and the consequences of failure to do so would be as formerly in the case of a certificate: see *Winch v Jones*, *Winch v Hayward* [1986] QB 296, [1985] 3 All ER 97, CA.

At common law a medical practitioner could not justify the taking charge of and confining an individual whom he had never seen merely upon statements made by relations, unless such statements satisfied him that his intervention was necessary to prevent the individual from doing immediate injury to himself or others (*Anderdon v Burrows* (1830) 4 C & P 210); but restraint of a person dangerous by reason of mental disorder is justifiable both at the moment of the original danger and also until there is reasonable ground for believing that the original danger is over (*Scott v Wakem* (1862) 3 F & F 328; and see *Symm v Fraser* (1863) 3 F & F 859). As to the duty of care owed by medical practitioners and hospital authorities generally see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARAS 196-205.

3 See the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed); and PARA 671 et seq post. As to the construction of references to the authority having such jurisdiction see s 111 (as amended; prospectively repealed); and PARA 675 post. See note 2 supra.

4 Ibid s 139(1). As from a day to be appointed s 139(1) is amended so as to omit the reference to Pt VII (as amended; prospectively amended and repealed): s 139(1) (prospectively amended by the Mental Capacity Act 2005 s 67, Sch 6 para 29(1), (3), Sch 7). At the date at which this volume states the law no such day had been appointed. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

As to the vicarious liability of the Health Authority see *R (on the application of Wilkinson) v Responsible Officer of Broadmoor Hospital* [2002] EWCA Civ 1545, [2002] 1 WLR 419. Claims under the Human Rights Act 1998 may be caught by the Mental Health Act 1983 s 139 (as amended): see *R (on the application of Wilkinson) v Responsible Officer of Broadmoor Hospital* supra; *W v Doncaster Metropolitan Borough Council* [2004] EWCA Civ 378, [2004] All ER (D) 49 (May).

5 Mental Health Act 1983 s 139(2). Proceedings instituted without such leave are a nullity: *Pountney v Griffiths* [1976] AC 314, [1975] 2 All ER 881, HL. As to such applications see CPR Pt 23; and CIVIL PROCEDURE. A successful application under the Mental Health Act 1983 s 139(2) does not prevent a judge, on an application to strike out, concluding on further investigation that the claim should be struck out as disclosing no reasonable cause of action: *X v A, B and C and the Mental Health Act Commission* (1991) 9 BMLR 91. As to leave see *Simpson-Cleghorn v Lancashire County Council* (5 July 1999, unreported), CA; *C v South London and Maudsley Hospital NHS Trust and London Borough of Lambeth* [2001] 1 MHLR 269.

6 Mental Health Act 1983 s 139(2). Failure to comply with the necessary consent before the proceedings were begun rendered them a nullity which was incapable of subsequent remedy: *Seal v Chief Constable of South Wales Police* [2005] EWCA Civ 586, (2005) Times, 31 May, [2005] All ER (D) 285 (May). In relation to Northern Ireland the reference in the Mental Health Act 1983 s 139 (as amended) to the Director of Public Prosecutions must be construed as a reference to the Director of Public Prosecutions for Northern Ireland: s 139(5).

7 *Winch v Jones*, *Winch v Hayward* [1986] QB 296, [1985] 3 All ER 97, CA. Only if the applicant's affidavits are totally refuted by incontrovertible evidence should leave be denied. See also *Furber v Kratter* (1988) Times, 21 July (leave granted by the High Court for actions in negligence and false imprisonment in relation to the seclusion of the applicant in a special hospital in inadequate conditions); *James v Mayor and Burgesses of the London Borough of Havering* (1992) 15 BMLR 1, CA (application for false imprisonment proceedings rejected as it was unarguable that the social worker or doctor had acted without unreasonable care in regard to the emergency compulsory admission; the Mental Health Act 1983 s 139 (as amended) is not only a protection against frivolous claims, but also from error in the circumstances set out in that provision).

8 See *Re Shoesmith* [1938] 2 KB 637, [1938] 3 All ER 186, CA; *Richardson v LCC* [1957] 2 All ER 330, [1957] 1 WLR 751, CA.

Since an order of a judge refusing an application under the Mental Health Act 1983 s 139(2) is an interim, not a final, order, no appeal lies against such an order without the leave of the judge or the Court of Appeal: *Moore v Metropolitan Police Comr* [1968] 1 QB 26, [1967] 2 All ER 827, CA. The onus is on the applicant to satisfy the court that the proceedings should be commenced: *Carter v Metropolitan Police Comr* [1975] 2 All ER 33, [1975] 1 WLR 507, CA.

9 *Whitehouse v Board of Control* [1960] 3 All ER 182n, [1960] 1 WLR 1093, HL.

10 *Ex p Waldron* [1986] QB 824, sub nom *R v Hallstrom, ex p W* [1985] 3 All ER 775, CA.

11 Mental Health Act 1983 s 139(3). The consent of the Director of Public Prosecutions is required for proceedings in respect of offences under s 127 (as amended) (ill-treatment of patients: see PARA 767 post). As to the Sexual Offences Act 2003 ss 30-44 (prospectively amended) (sexual offences relating to persons with a mental disorder) see PARA 769 post. As to the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARAS 1066, 1079 et seq.

12 le within the meaning of the National Health Service and Community Care Act 1990: see HEALTH SERVICES vol 54 (2008) PARA 155.

13 Mental Health Act 1983 s 139(4) (amended by the National Health Service and Community Care Act 1990 s 66(1), Sch 9 para 24(7); the Health Authorities Act 1995 s 2(1), Sch 1 para 107(11); the Health and Social Care (Community Health and Standards) Act 2003 s 34, Sch 4 paras 50, 56; the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 para 16(1), (8); and the National Health Service Reform and Health Care Professions Act 2002 (Supplementary, Consequential etc Provisions) Regulations 2002, SI 2002/2469, reg 4, Sch 1 Pt 1 para 10(1), (3)). As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 post. For the meaning of 'strategic health authority' see PARA 439 note 6 post. For the meanings of 'health authority' and 'primary care trust' see PARA 414 note 6 post. As to NHS trusts and NHS foundation trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq.

UPDATE

407 Protection for acts done in pursuance of the Mental Health Act 1983

NOTE 1--*Munjaz*, cited reported at [2006] 2 AC 148.

NOTE 4--Day now appointed: SI 2007/1897.

NOTE 5--The claimant should issue proceedings well before the end of the limitation period: *Seal v Chief Constable of South Wales Police* [2007] UKHL 31, [2007] 4 All ER 177, [2007] 1 WLR 1910.

TEXT AND NOTE 13--1983 Act s 139(4) further amended: National Health Service (Consequential Provisions) Act 2006 Sch 1 para 69; References to Health Authorities Order 2007, SI 2007/961.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/1. INTRODUCTION/(2) GENERAL SCHEME OF THE LEGISLATION/408. Private international law.

408. Private international law.

As from a day to be appointed¹, Schedule 3 to the Mental Capacity Act 2005 makes provision as to private international law in relation to persons who cannot protect their interests, governing which jurisdiction should apply when a national of one country is in another state, in particular giving effect in England² and Wales³ to the Convention on the International Protection of Adults⁴.

As well as various preliminary provisions⁵, the Mental Capacity Act 2005 provides the grounds⁶ on which the Court of Protection⁷ will exercise its jurisdiction when dealing with cases with an international element⁸. The court may exercise its jurisdiction in relation to: (1) an adult habitually resident in England and Wales; (2) an adult's property in England and Wales; (3) an adult present in England or Wales or who has property there (if the matter is urgent); or (4) an adult present in England and Wales (if a protective measure which is temporary and limited in its effect to England and Wales is proposed in relation to him)⁹. An adult present in England and Wales is to be treated as habitually resident if his habitual residence cannot be ascertained, he is a refugee or he has been displaced as a result of disturbance in the country of his habitual residence¹⁰. Once the provisions of the Convention are in force the court will also be able to exercise jurisdiction, in so far as it cannot otherwise do so, in relation to a British citizen with a closer connection with England and Wales than with Scotland or Northern Ireland; the jurisdiction may be exercised provided that the court considers that it is in a better position to assess the interests of the adult, that certain requirements as to notification of other Convention countries are complied with and that other Convention countries which may have jurisdiction on certain grounds have not dealt, or are not dealing, with the matter¹¹.

The Mental Capacity Act 2005 makes provision as to which law is to apply in various situations¹². Although the Court of Protection will normally apply the law of England and Wales, and the conditions of implementation of any protective measure taken abroad will be governed by the law of England and Wales if implemented in England and Wales, the court may apply the law of another country if it thinks that a matter has a substantial connection with that country¹³. In addition, the donor of a foreign power like a lasting power of attorney¹⁴ may specify that the law applicable to the existence, extent, modification or extinction of the power is to be the law of a country of which he is a national, in which he is habitually resident, or in which he has property¹⁵. Protection is provided for a third party who enters into a transaction with a representative on behalf of a person, where that representative was actually not entitled so to act under the law of a country other than England and Wales applicable by virtue of the Mental Capacity Act 2005¹⁶.

The Mental Capacity Act 2005 provides for the recognition and enforcement of protective measures taken in other countries¹⁷. It provides that: (a) a protective measure is to be recognised in England and Wales if it was taken on the ground that the adult is habitually resident in the other country; (b) a protective measure taken in another Convention country is to be recognised provided that it was taken on a ground provided for in the Convention, although the court may refuse to recognise a protective measure where it thinks that the case in which the measure was taken was not urgent, the adult was not given an opportunity to be heard, and that omission amounted to a breach of natural justice¹⁸.

Provision is made for co-operation between authorities in England and Wales and authorities in other Convention countries¹⁹.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 For the meaning of 'England' see PARA 405 note 6 ante.

3 For the meaning of 'Wales' see PARA 405 note 7 ante.

4 See the Mental Capacity Act 2005 s 63, Sch 3. Schedule 3 gives effect in England and Wales to the Convention on the International Protection of Adults (the Hague, 13 January 2000; Cm 5881) ('the Hague Convention') (in so far as the Mental Capacity Act 2005 does not otherwise do so) and makes related provision as to the private international law of England and Wales: Mental Capacity Act 2005 s 63. For the purposes of the Convention, England and Wales, Scotland and Northern Ireland constitute separate jurisdictions. The Convention only enters into force once ratified by three states but the Mental Capacity Act 2005 Sch 3 provides private international law rules to govern jurisdictional issues between England and Wales on the one hand and Scotland on the other, regardless of whether the Convention is actually in force. See CONFLICT OF LAWS.

The Mental Capacity Act 2005 Sch 3 contains powers to make further provision as to private international law by Order in Council and regulations; and there are also provisions about certificates of proof, exceptions and commencement: see Sch 3 Pt 6 (paras 30-35). See CONFLICT OF LAWS.

5 See *ibid* Sch 3 Pt 1 (paras 1-6); and CONFLICT OF LAWS.

6 *le* based on the Hague Convention arts 5-11.

7 As to the Court of Protection under the Mental Capacity Act 2005 see PARA 750 post.

8 See *ibid* Sch 3 Pt 2 (paras 7-10); and CONFLICT OF LAWS.

9 See *ibid* Sch 3 para 7(1); and CONFLICT OF LAWS.

10 See *ibid* Sch 3 para 7(2); and CONFLICT OF LAWS.

11 See *ibid* Sch 3 para 8; and CONFLICT OF LAWS. As to where jurisdiction is exercisable in connection with a matter involving a Convention country other than England and Wales see Sch 3 para 9; and CONFLICT OF LAWS.

12 See *ibid* Sch 3 Pt 2 (paras 11-18); and CONFLICT OF LAWS.

13 See *ibid* Sch 3 paras 11, 12; and CONFLICT OF LAWS.

14 For the meaning of 'lasting power of attorney' under the Mental Capacity Act 2005 see PARA 642 note 16 post. See also PARA 647 *et seq* post.

15 See *ibid* Sch 3 paras 13-15; and CONFLICT OF LAWS.

16 See *ibid* Sch 3 para 16; and CONFLICT OF LAWS. There are also provisions on mandatory provisions of the law of England and Wales where the court is exercising jurisdiction and qualifications for public policy: see Sch 3 paras 17, 18; and CONFLICT OF LAWS.

17 See *ibid* Sch 3 Pt 4 (paras 19-25); and CONFLICT OF LAWS.

18 See *ibid* Sch 3 para 19; and CONFLICT OF LAWS. The court may also refuse recognition if it would be manifestly contrary to public policy, the measure would be inconsistent with a mandatory provision of the law of England and Wales, or the measure is inconsistent with one subsequently taken or recognised in relation to the adult: see Sch 3 para 19.

19 See *ibid* Sch 3 Pt 5 (paras 26-29); and CONFLICT OF LAWS.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(1) IN GENERAL/409. Mental health services.

2. MENTAL HEALTH SERVICES

(1) IN GENERAL

409. Mental health services.

Services for mentally disordered¹ people consist, broadly, of: (1) services provided by the health authorities², including hospital and specialist services³; and (2) social services provided by local social services authorities⁴ for people living in the community.

1 For the meaning of 'mentally disordered' see PARA 402 ante.

2 See PARA 414 et seq post.

3 See PARA 415 post.

4 See PARA 424 et seq post.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(2) FUNCTIONS OF CENTRAL GOVERNMENT/410. The Secretary of State.

(2) FUNCTIONS OF CENTRAL GOVERNMENT

410. The Secretary of State.

By virtue of his duty to promote a comprehensive health service under the National Health Service Act 1977, the Secretary of State¹ is the central authority responsible for providing or securing those mental health services which form part of the national health service². He has a specific duty to provide, inter alia, hospital accommodation to the extent he considers necessary to meet all reasonable requirements³, and such facilities for the prevention, care and after-care of illness as are appropriate as part of the health service⁴. He also has a duty to provide hospital accommodation and services for persons liable to be detained under the Mental Health Act 1983 whom he considers require treatment under conditions of high security⁵.

The Secretary of State supervises and directs local social services authorities⁶ in the exercise of their functions in providing social services for people suffering from mental disorder⁷. The Secretary of State may make an order declaring a local social services authority to be in default in carrying out its statutory functions in this respect, and such an order may contain such directions for the purpose of ensuring that the duty is complied with within a specified period as appear necessary to the Secretary of State⁸.

The Secretary of State may by order establish special bodies for the purpose of exercising any functions which may be conferred on them by or under the National Health Service Act 1977⁹. Unless the body is allocated a particular name, it is to be called a special health authority¹⁰. The Mental Health Act Commission has been established under these provisions¹¹.

The Secretary of State is the authority with power to make regulations for most purposes relating to mental health¹².

The Secretary of State must prepare, and from time to time revise, a code of practice for: (1) the guidance of registered medical practitioners, managers and staff of hospitals, independent hospitals and care homes and approved social workers in relation to the admission of patients to hospitals and registered establishments and to guardianship and after-care under supervision; and (2) the guidance of registered medical practitioners and members of other professions in relation to the medical treatment of patients suffering from mental disorder¹³.

The Secretary of State may conduct or assist research into matters relating to the causation, prevention, diagnosis or treatment of illness¹⁴.

The Secretary of State has power to pay pocket money to patients in hospitals used wholly or mainly for the treatment of people suffering from mental disorder¹⁵; to pay travelling expenses to visitors to patients in hospitals in which high security psychiatric services are provided¹⁶; to transfer patients between or from such hospitals¹⁷; to transfer patients to Scotland, Northern Ireland, the Channel Islands or the Isle of Man¹⁸; to remove alien patients abroad¹⁹; and to refer patients to mental health review tribunals²⁰. The Secretary of State approves medical practitioners as having special experience in the diagnosis or treatment of mental disorder for the purpose of making medical recommendations under the Mental Health Act 1983²¹.

The Secretary of State also has a number of powers under the Mental Health Act 1983 which relate to prisoners and patients subject to special restrictions²². These powers enable him in prescribed circumstances to direct the transfer to hospital of certain prisoners and to place restrictions on their discharge from hospital²³; to direct that a patient is no longer to be subject

to restrictions²⁴; to discharge restricted patients absolutely or conditionally and to recall conditionally discharged patients to hospital²⁵; and to withhold consent to the discharge, transfer or grant of leave of absence to such patients²⁶. He also authorises the removal of restricted patients to Scotland, Northern Ireland, the Channel Islands or the Isle of Man²⁷. He can direct the removal to a hospital in England or Wales, and the return, of an offender found to be insane and ordered to be detained during Her Majesty's pleasure by a court in the Channel Islands or the Isle of Man²⁸.

1 le one of Her Majesty's principal Secretaries of State: see the Interpretation Act 1978 s 5, Sch 1. While older statutes referred to specific ministers or government departments, modern statutes (eg the Mental Health Act 1983 and the Mental Capacity Act 2005) refer simply to 'the Secretary of State' without reference to a particular department or ministry. The office of Secretary of State is a unified office, and in law each Secretary of State is capable of performing the functions of all or any of them: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 355. For the most part in this title the relevant Secretary of State is the Secretary of State for Health, although certain functions are the responsibility of the Home Secretary (see note 22 *infra*). As to the Secretary of State for Health see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 463-465; HEALTH SERVICES vol 54 (2008) PARA 10 *et seq.* As to the Home Secretary see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 466 *et seq.* As to the transfer of certain ministerial functions, so far as they are exercisable in relation to Wales, to the National Assembly for Wales see PARA 411 *post*.

There are to be paid out of money provided by Parliament any expenses incurred by the Secretary of State under the Mental Health Act 1959 or under the Mental Health (Amendment) Act 1982 and any increase attributable to either Act in the sums so payable under any other Act: Mental Health Act 1959 s 144(1) (amended by the Mental Health Act 1983 s 148(3), Sch 6); Mental Health (Amendment) Act 1982 s 67. As to the financing of the national health service see HEALTH SERVICES vol 54 (2008) PARA 503 *et seq.* As to the financing of local social services see LOCAL GOVERNMENT vol 29(1) (Reissue) PARA 514 *et seq.*

2 See the National Health Service Act 1977 s 1(1). As to the health service generally see HEALTH SERVICES vol 54 (2008) PARA 1 *et seq.* As to inquires and investigations see PARA 434 *post*.

3 Ibid s 3(1)(a). As to hospitals admitting mentally disordered people see PARA 416 *post*.

4 Ibid s 3(1)(e). As to the meaning of 'facilities' in s 3(1)(e) see *R (on the application of Keating) v Cardiff Local Health Board (Secretary of State for Health intervening)* [2005] EWCA Civ 847, [2005] 3 All ER 1000.

5 See the National Health Service Act 1977 s 4 (as substituted); and PARA 418 *post*.

6 For the meaning of 'local social services authority' see PARA 424 *post*.

7 Local Authority Social Services Act 1970 s 7A (ss 7A-7E added by the National Health Service and Community Care Act 1990 s 50). As to those functions see PARA 425 *post*. The Secretary of State may, with the approval of the Treasury, make grants out of money provided by Parliament towards any expenses of local authorities incurred in connection with the exercise of their social services functions in relation to persons suffering from mental illness: Local Authority Social Services Act 1970 s 7E (as so added). As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.

8 See *ibid* s 7D(1), (2) (s 7D as added (see note 7 *supra*); and s 7D(1) amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 12, 13). A direction is enforceable, on the application of the Secretary of State, by mandatory order (formerly mandamus): Local Authority Social Services Act 1970 s 7D(3) (as so added). See SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1011. As to the complaints procedure and inquiries see ss 7B, 7C (as so added).

The Secretary of State may also make an order declaring an authority to be in default in carrying out its statutory functions under the Mental Health Act 1959, and apply the provisions of the National Health Service Act 1977 s 85(5) (see HEALTH SERVICES vol 54 (2008) PARA 79 *et seq.*): see the Mental Health Act 1959 s 142 (amended by the Local Government Act 1972 s 195(6), Sch 23 para 9(2); and the National Health Service Act 1977 s 129, Sch 15 para 32).

9 National Health Service Act 1977 s 11(1) (substituted by the Health Act 1999 s 65, Sch 4 paras 4, 6).

10 National Health Service Act 1977 s 11(3), (4) (s 11(3) amended by the Health Authorities Act 1995 s 2(1), Sch 1 para 2(b)). 'Special health authority' means a special health authority established under the National Health Service Act 1977 s 11 (as amended) (see HEALTH SERVICES vol 54 (2008) PARA 136 *et seq.*): Mental Health Act 1983 s 145(1).

11 See the Mental Health Act Commission (Establishment and Constitution) Order 1983, SI 1983/892 (as amended); and PARA 413 post.

12 Any power of the Secretary of State or the Lord Chancellor to make regulations, orders or rules under the Mental Health Act 1959 or the Mental Health Act 1983 is exercisable by statutory instrument: Mental Health Act 1959 s 145(1); Mental Health Act 1983 s 143(1). As from a day to be appointed, the Mental Health Act 1959 s 145(1) is amended so as to omit the reference to the Lord Chancellor: s 145(1) (prospectively amended by the Constitutional Reform Act 2005 ss 15(1), 146, Sch 4 Pt 1 para 51, Sch 18 Pt 2). As from a day to be appointed, the Mental Health Act 1983 s 143 is amended so as to provide that it is not to apply to rules made in accordance with the Constitutional Reform Act 2005 Sch 1 Pt 1: Mental Health Act 1983 s 143(4) (prospectively added by the Constitutional Reform Act 2005 s 12(2), Sch 1 Pt 2 paras 14, 16). At the date at which this volume states the law no such day or days had been appointed. As to the Lord Chancellor see PARA 412 post; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq. The Mental Health Act 1983 s 143 (as amended) (so far as applicable to any Order in Council extending to Scotland) extends to Scotland: see s 146 (prospectively amended); and PARA 405 ante.

Any Order in Council or any order made under s 54A (as added) (see PARA 495 post) or s 65 (as amended) (see PARAS 560-562 post) and any statutory instrument containing regulations or rules made under the Mental Health Act 1983 must be laid before Parliament and is subject to annulment in pursuance of a resolution of either House of Parliament: s 143(2) (amended by the Criminal Justice Act 1991 s 27(3); and the Health Authorities Act 1995 s 2(1), Sch 1 para 107(13)).

The Secretary of State has power to make regulations imposing requirements in relation to the management, staff, premises and conduct of registered establishments (see PARA 421 post) and agencies (see the Care Standards Act 2000 ss 22-23; and SOCIAL SERVICES AND COMMUNITY CARE) and with respect to the carrying out of many functions of the health service (see HEALTH SERVICES vol 54 (2008) PARA 7 et seq).

13 See the Mental Health Act 1983 s 118 (as amended); and PARA 436 post. As to the meaning of 'medical treatment' see PARA 552 post.

14 See the National Health Service Act 1977 s 5(2)(d); and HEALTH SERVICES vol 54 PARA 38.

15 See the Mental Health Act 1983 s 122 (as amended); and PARA 630 post.

16 See the Health Services and Public Health Act 1968 s 66(1) (as amended); and PARA 420 post.

17 See the Mental Health Act 1983 s 123 (as amended); and PARAS 419, 517 post.

18 See *ibid* ss 80-85A (as amended); and PARAS 542-547 post.

19 See *ibid* s 86 (as amended); and PARA 548 post.

20 See *ibid* s 67 (as amended); and PARA 568 post.

21 See *ibid* s 12(2); and PARA 482 post.

22 These are patients subject to restriction orders under *ibid* s 41 (as amended) (see PARA 496 post), orders for committal to hospital (see PARA 498 post), admission orders with a restriction direction (see PARA 499 post) or transfer directions with restrictions under s 49 (see PARA 537 post), and any other order or direction to the same effect: see s 55(4); and PARA 488 post. The power to make such orders and directions is generally exercised by the Home Secretary.

23 See *ibid* ss 47-49 (as amended); and PARAS 535-537 post.

24 See *ibid* s 42(1); and PARA 501 post.

25 See *ibid* ss 42(2), (3); and PARA 524 post.

26 See *ibid* s 41(3) (as amended); and PARA 496 post.

27 See *ibid* ss 80, 81, 83 (as amended); and PARAS 542, 544, 547 post.

28 See *ibid* s 84 (as amended); and PARA 546 post.

UPDATE

410 The Secretary of State

TEXT AND NOTES 1-14--For consolidation of health service enactments see National Health Service Act 2006, National Health Service (Wales) Act 2006 and National Health Service (Consequential Provisions) Act 2006; and HEALTH SERVICES.

NOTE 4--As to the duty of the Secretary of State to follow the decision of a responsible medical officer see *R (on the application of K) v West London Mental Health NHS Trust* [2006] EWCA Civ 118, [2006] 1 WLR 1865.

NOTE 8--Mental Health Act 1959 s 142 further amended: National Health Service (Consequential Provisions) Act 2006 Sch 1 para 24.

NOTE 10--In definition of 'special health authority' in 1983 Act s 145(1) for 'National Health Service Act 1977 s 11' read 'National Health Service Act 2006 s 28 or the National Health Service (Wales) Act 2006 s 22': National Health Service (Consequential Provisions) Act 2006 Sch 1 para 70(f).

TEXT AND NOTE 11--Mental Health Act Commission dissolved and functions transferred, in relation to England, to the Care Quality Commission, and in relation to Wales, to the Welsh Ministers: see the Health and Social Care Act 2008 ss 1(2), 52(3). SI 1983/892 revoked: 2008 Act Sch 15 Pt 1.

NOTE 12--Amendments made by Constitutional Reform Act 2005 now in force: SI 2006/1014. See also s 19, Sch 7 para 4. Mental Health Act 1983 s 143 further amended: Mental Health Act 2007 ss 37(5), 47.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(2) FUNCTIONS OF CENTRAL GOVERNMENT/411. The National Assembly for Wales.

411. The National Assembly for Wales.

Many statutory functions vested in Ministers of the Crown or the Secretary of State¹ are now exercisable in relation to Wales² by the National Assembly for Wales³. Functions transferred include ministerial functions under the Mental Health Act 1959⁴; the Local Authority Social Services Act 1970⁵; the Mental Health Act 1983⁶; the National Health Service and Community Care Act 1990⁷; and the Health Authorities Act 1995⁸. In general, statutes that have come into force since the establishment of the National Assembly for Wales make specific provision for the exercise of functions in relation to Wales⁹.

1 As to the Secretary of State see PARA 410 ante.

2 For the meaning of 'Wales' see PARA 405 note 7 ante.

3 See the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (as amended). As to the establishment, constitution and functions of the National Assembly for Wales see the Government of Wales Act 1998; and CONSTITUTIONAL LAW AND HUMAN RIGHTS.

Note that Sch 1 (as amended) does not transfer any functions of the Lord Chancellor: see art 2(f). As to the Lord Chancellor see PARA 412 post; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

Any enactment which charges the payment of any sum on the Consolidated Fund or requires or authorises the payment of any sum from that Fund, or requires or authorises the payment of any sum out of money provided by Parliament, ceases to have effect in so far as that sum is payable by the Assembly: s 89. As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 78 (2010) PARA 1028 et seq.

4 See the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. As to the Mental Health Act 1959 generally see PARA 405 ante.

5 See the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. As to the Local Authority Social Services Act 1970 see PARAS 424-425 post; and LOCAL GOVERNMENT vol 69 (2009) PARAS 36, 558; SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARAS 1006-1007, 1011.

6 See the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by SI 2000/253).

Functions under the Mental Health Act 1983 are transferred except those under s 41 (as amended) (see PARAS 496-497 post), s 42 (see PARAS 501, 524 post), s 45A(10), (11) (as added) (see PARA 490 post), ss 45B-51 (as added and amended) (see PARAS 490, 535-539 post), s 53 (as amended) (see PARA 541 post), s 71 (as amended) (see PARA 568 post), ss 73-75 (as amended) (see PARAS 564, 568, 570 post), s 80A (as added and amended) (see PARA 542 post), s 81A (as added) (see PARA 544 post), s 82A (as added) (see PARA 545 post), s 83A (as added) (see PARA 547 post), s 84 (as amended) (see PARA 546 post), s 85A (as added) (see PARA 546 post), s 86 (as amended) (see PARA 548 post), and Sch 2 (as amended) (see PARA 561 post): see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (as so amended).

Functions under the Mental Health Act 1983 s 80 (as amended) (see PARA 542 post), s 81 (as amended) (see PARA 544 post) and s 83 (see PARA 547 post) are transferred except in relation to a patient who is subject to one or more of the following, namely:

- 1 (1) a restriction order (see PARA 496 note 7 post);
- 2 (2) a hospital direction (see PARA 490 note 8 post);
- 3 (3) a limitation direction (see PARA 490 note 9 post); or
- 4 (4) a restriction direction (see PARA 537 note 8 post),

made under s 41 (as amended) (see PARA 496 post), s 45A (as added and amended) (see PARA 490 post) or, as the case may be, s 49 (see PARAS 501, 537 post): see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (as so amended).

In the Mental Health Act 1983 s 19(3) (as amended) (see PARA 512 post) and in the definition of 'the managers' in s 145(1) (definition as amended) (see PARA 439 head (1) post), references to a hospital vested in the Secretary of State for the purposes of his functions under the National Health Service Act 1977 have effect as if they included a reference to a hospital vested in the Assembly for purposes of its functions under that Act: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (as so amended).

The provisions of the Mental Health Act 1983 s 23(4), (5) (as amended) (see PARA 523 post) do not apply to the exercise by the Assembly of the powers conferred by those provisions: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (as so amended).

The Mental Health Act 1983 s 24(3) (as amended) (see PARA 526 post) has effect as if it applied to an application by the Assembly as well as to an application by the Secretary of State: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (as so amended).

The Mental Health Act 1983 s 54(1) (as amended) (see PARA 492 post) and s 117(2A)(a) (as added and amended) (see PARA 428 post) have effect as if references to a registered medical practitioner approved for the purposes of s 12 (as amended) (see PARAS 482-484 post) by the Secretary of State (including references to be construed as such) included a reference to such a practitioner approved by the Assembly: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (as so amended).

The Mental Health Act 1983 s 139(4) (as amended) (see PARA 407 ante) has effect as if it referred to the Assembly as well as the Secretary of State: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (as so amended).

The Mental Health Act 1983 s 142(1) (as amended; prospectively repealed) (see PARA 628 post) has effect as if the reference to a government department included a reference to the Assembly: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (as so amended).

The Treasury approval requirements under the Mental Health Act 1983 s 119(1) (see PARA 554 post), s 120(6) (see PARA 441 post) and s 121(6) (see PARA 438 post) continue in effect so far as they relate to pensions: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (as so amended). As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.

The function of the Lord Chancellor under the Mental Health Act 1983 Sch 2 para 1(b), (c) (prospectively amended) (see PARA 561 post), so far as it is exercisable in relation to Wales, is exercisable only after consultation with the Assembly: National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 5, Sch 2.

7 Functions under the National Health Service and Community Care Act 1990 are transferred subject to certain exceptions and qualifications, but these are not relevant for the purposes of this title: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by the Health Act 1999 s 66(4), (5)(b)). As to the National Health Service and Community Care Act 1990 generally see PARA 414 et seq post; and HEALTH SERVICES.

8 See the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. As to the Health Authorities Act 1995 generally see PARA 414 et seq post.

9 Eg a number of provisions in the Mental Capacity Act 2005 (not yet in force) make specific reference to the National Assembly for Wales, including s 30(6) (see PARA 659 post), s 35(7) (see PARA 664 post), s 37(7) (see PARA 666 post), s 38(8) (see PARA 667 post), s 43 (see PARA 646 post), and s 68(2) (see PARA 406 note 43 ante). As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

UPDATE

411 The National Assembly for Wales

TEXT AND NOTES--For consolidation of health service enactments see National Health Service Act 2006, National Health Service (Wales) Act 2006 and National Health Service (Consequential Provisions) Act 2006; and HEALTH SERVICES.

NOTE 3--As to the National Assembly for Wales and the Welsh Assembly Government, see Government of Wales Act 2006; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 42A et seq.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(2) FUNCTIONS OF CENTRAL GOVERNMENT/412. The Lord Chancellor.

412. The Lord Chancellor.

The responsibilities of the Lord Chancellor¹ under the Mental Health Act 1983 are concerned principally with the management of the property and affairs of mentally disordered persons². The Lord Chancellor also appoints the members of the mental health review tribunals³ and may make rules as to their procedure⁴.

As from a day to be appointed⁵, the Lord Chancellor also has a number of functions under the Mental Capacity Act 2005⁶.

1 As to the appointment and functions of the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

2 See the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed); and PARA 671 et seq post.

3 See *ibid* s 65(2), Sch 2 para 1 (prospectively amended); and PARA 560 et seq post.

4 See *ibid* s 78(1)-(3); the Mental Health Review Tribunal Rules 1983, SI 1983/942 (as amended); and PARA 576 post. For general provisions as to rules made under the Mental Health Act 1983 see PARA 410 note 12 ante.

5 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

6 See eg *ibid* s 13 (revocation of lasting powers of attorney) (see PARA 650 post); s 21 (transfer of proceedings relating to people under 18) (see PARA 757 post); ss 42, 43 (codes of practice) (see PARAS 645-646 post); ss 45-46 (Court of Protection) (see PARA 750 post); s 51 (Court of Protection Rules) (see PARA 752 post); s 52 (practice directions) (see PARA 753 post); s 54 (fees for the Court of Protection) (see PARA 755 post); ss 57, 58, 60 (the Public Guardian) (see PARAS 761-762 post); s 59 (the Public Guardian Board) (see PARA 763 post); s 61 (Court of Protection Visitors) (see PARA 764 post); s 65 (rules, regulations and orders) (see PARA 406 note 68 ante); s 67 (amendments and repeals) (see PARA 406 note 66 ante); and s 68 (commencement) (see PARA 406 note 43 ante).

UPDATE

412 The Lord Chancellor

NOTE 4--SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(3) THE MENTAL HEALTH ACT COMMISSION/413. The Mental Health Act Commission.

(3) THE MENTAL HEALTH ACT COMMISSION

413. The Mental Health Act Commission.

The Secretary of State¹ has established a special health authority² known as the Mental Health Act Commission³. The duties of the Commission include: (1) a duty to make certain appointments on behalf of the Secretary of State⁴; (2) a duty to review decisions as to withholding correspondence from detained patients⁵; (3) a duty to provide, on behalf of the Secretary of State, general protection for detained patients⁶; (4) a duty, where directed by the Secretary of State, to keep under review the care and treatment of informal patients⁷. The Commission must every two years publish a report on its activities and a copy must be laid before Parliament⁸.

1 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

2 See under the National Health Service Act 1977 s 11 (as amended); see PARA 410 ante. For the meaning of 'special health authority' see PARA 410 note 10 ante.

3 Mental Health Act 1983 s 121(1) (amended by the Health Authorities Act 1995 s 2(1), Sch 1 para 107(9) (a)); Mental Health Act Commission (Establishment and Constitution) Order 1983, SI 1983/892 (amended by SI 1998/1577).

As to the pay and allowances of the Commission members see the Mental Health Act 1983 s 121(11) (amended by the Health and Social Security Act 1984 s 6; and the Health Authorities Act 1995 s 2(1), Sch 1 para 107(9)); and the National Health Service Act 1977 Sch 5 para 9 (amended by the Health and Social Security Act 1984 ss 5, 24, Sch 3 para 13, Sch 8 Pt I; the National Health Service and Community Care Act 1990 s 1(3), Sch 1 Pt III para 7; the Health Authorities Act 1995 ss 2(1), 5(1), Sch 1 para 60(b), Sch 3; the Health Act 1999 s 65(1), Sch 4 paras 4, 39(1), (2); and the National Health Service Reform and Health Care Professions Act 2002 s 1(3), Sch 1 Pt I paras 1, 34(1), (3)(b)). As to the appointment and tenure of office of the chairman of the Commission, and as to meetings and proceedings of the Commission, see the Mental Health Act Commission Regulations 1983, SI 1983/894 (amended by SI 1995/2630; SI 1996/707; SI 2004/696).

As to the public law function of the Commission see *X v A, B and C and the Mental Health Act Commission* (1991) 9 BMLR 91. The Mental Health Act Commission is a public authority for the purposes of the Human Rights Act 1998: see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 6; CONSTITUTIONAL LAW AND HUMAN RIGHTS.

As to the body corporate known as the Commission for Healthcare Audit and Inspection (CHAI), established under the Health and Social Care (Community Health and Standards) Act 2003, the general function of which is to encourage improvement in the provision of health care by NHS bodies, see HEALTH SERVICES vol 54 (2008) PARA 552 et seq.

4 See the Mental Health Act 1983 s 121(2)(a); and PARA 554 post.

5 See *ibid* s 121(7)-(9); and PARA 443 post.

6 See *ibid* ss 120(1), (4), 121(2)(b) (s 120(1), (4) as amended); and PARA 441 post.

7 See *ibid* s 121(4), (5) (as amended); and PARA 438 post. At the date at which this volume states the law no such direction had been made.

8 *Ibid* s 121(10).

UPDATE

413 The Mental Health Act Commission

TEXT AND NOTES--Mental Health Act 1983 s 121 repealed: Health and Social Care Act 2008 s 52(4), Sch 15 Pt 1.

The Mental Health Commission is dissolved and a new body corporate known as the Care Quality Commission has been established: Health and Social Care Act 2008 s 1(1), (2). Its main objective in performing its functions is to protect and promote the health, safety and welfare of people who use health and social care services: see Pt 1 Ch 1 (ss 1-7), Schs 1, 2. Its functions include those of the Mental Health Commission and certain other public service inspectorates, in particular, specified functions under the Mental Health Act 1983: see the Health and Social Care Act 2008 Pt 1 Ch 4 (s 52), Sch 3. As to the Care Quality Commission generally see Pt 1 Ch 1 (ss 1-7), Schs 1, 2; the Care Quality Commission (Membership) Regulations 2008, SI 2008/2252; and SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1011A.

NOTE 3--SI 1983/892, SI 1983/894 revoked: Health and Social Care Act 2008 Sch 15 Pt 1.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(4) HEALTH AND HOSPITAL SERVICES/414. General responsibilities.

(4) HEALTH AND HOSPITAL SERVICES

414. General responsibilities.

The responsibilities of the national health service, so far as mentally disordered persons are concerned, fall into two groups: (1) the provision of hospital and specialist services¹; and (2) the provision of health services in the community². Since the enactment of the Mental Health Act 1959, both of these have been provided as part of the general health service; they are now provided under the National Health Service Act 1977. Most of these services are provided by regional, district and special health authorities³ and NHS trusts⁴ on behalf of the Secretary of State for Health⁵.

It is the duty of the primary care trust or health authority⁶, and of the local social services authority⁷, to provide after-care services, in co-operation with relevant voluntary agencies, for certain people⁸ who were formerly detained patients in hospital⁹.

1 See PARA 415 et seq post; and HEALTH SERVICES vol 54 (2008) PARA 10 et seq. As to duties under the Health and Social Care (Community Health and Standards) Act 2003 see HEALTH SERVICES vol 54 (2008) PARA 548 et seq.

2 This includes the duty, under the National Health Service Act 1977 s 3(1)(e) (see PARA 410 ante), to provide such services for the prevention, care and after-care of illness as are appropriate as part of the health service: see HEALTH SERVICES vol 54 (2008) PARA 12.

The local authority also has a duty to carry out an assessment of needs for community care services: see the National Health Service and Community Care Act 1990 s 47 (as amended); and SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1015 et seq. For the meaning of 'community care services' see PARA 425 note 3 post; and SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1012. Note that 'community care services' includes services which the authority may provide or arrange to be provided under the Mental Health Act 1983 s 117 (as amended). As to the entitlement to community care assessment see *R (on the application of HP) v Islington London Borough Council* [2004] EWHC 7 (Admin), [2004] All ER (D) 71 (Jan). As to when the duties under the National Health Service and Community Care Act 1990 s 47 (as amended) and the Mental Health Act 1983 s 117(2) arise see *R (on the application of B) v Camden London Borough Council* [2005] EWHC 1366 (Admin), [2005] All ER (D) (Jul). See also PARA 428 post.

3 For the meaning of 'special health authority' see PARA 410 note 10 ante.

4 I.e. created under the National Health Service and Community Care Act 1990 s 5 (as amended): see HEALTH SERVICES vol 54 (2008) PARA 155 et seq.

5 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

6 See the Mental Health Act 1983 s 117(3) (amended by the Health Authorities Act 1995 s 2(1), Sch 1 para 107(1), (8)(b); and the National Health Service Reform and Health Care Professions Act 2002 s 2(5), Sch 2 Pt 2 paras 42, 47). 'Primary care trust' means a primary care trust established under the National Health Service Act 1977 s 16A (as added and amended): Mental Health Act 1983 s 145(1) (definition added by the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 paras 16(1), (9)(b)). 'Health authority' means a health authority established under the National Health Service Act 1977 s 8 (as amended): Mental Health Act 1983 s 145(1) (definition added by the Health Authorities Act 1995 s 2(1), Sch 1 para 107(14)). As to primary care trusts and health authorities generally see HEALTH SERVICES vol 54 (2008) PARA 75 et seq.

7 I.e. the local social services authority for the area in which the person concerned is resident or to which he is sent on discharge by the hospital in which he was detained: see the Mental Health Act 1983 s 117(3) (as amended: see note 6 supra); and PARAS 424, 428 post. For the meaning of 'hospital' see PARA 417 post.

8 I.e. any person who was detained under *ibid* s 3 (admission for treatment: see PARA 461 post) or s 37 (as amended) (hospital order: see PARA 491 post) or s 45A (as added and amended) (hospital direction: see PARA

490 post) or s 47 or s 48 (as amended) (transfer from prison: see PARAS 535-536 post), who ceases to be detained and (whether or not immediately after so ceasing) leaves hospital: s 117(1) (amended by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 15(1), (2); and the Crime (Sentences) Act 1997 s 55, Sch 4 para 12(17)). It is submitted that this applies to patients given leave of absence (see PARA 506 post) and conditionally discharged restricted patients (see PARAS 524, 570-571 post) who remain liable to be detained but are no longer actually detained in hospital. See also *R v Ealing District Health Authority, ex p Fox* [1993] 3 All ER 170, [1993] 1 WLR 373, 11 BMLR 59 (district health authority under a duty to provide after-care services to comply with a conditional order for the patient's discharge from Broadmoor).

9 Mental Health Act 1983 s 117(2) (amended by the Health Authorities Act 1995 s 2(1), Sch 1 para 107(1), (8)(a); the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 15(1), (3); and the National Health Service Reform and Health Care Professions Act 2002 s 2(5), Sch 2 Pt 2 paras 42, 47). For general guidance on after-care arrangements see the Code of Practice (1999) PARAS 27.1-27.12. See also PARA 428 post. As to the Code of Practice (1999) see PARA 436 post.

Where a health authority or primary care trust, which has or will have a duty under the Mental Health Act 1983 s 117 (as amended) to provide after-care services to a patient, makes an arrangement under the National Health Service Act 1977 s 23 (as amended) or the National Health Service and Community Care Act 1990 s 4 (as amended) for the provision by another person or body of services consisting of or including psychiatric and related services for that patient, it may authorise that other person or body to perform on its behalf its functions under the relevant provisions in respect of that patient: Mental Health (After-care under Supervision) Regulations 1996, SI 1996/294, reg 2(2) (amended by SI 2002/2469). A health authority or primary care trust may make arrangements for its functions under the relevant provisions to be exercised on its behalf by any of the persons or bodies specified in the National Health Service Act 1977 s 16(1)(a)(i)-(v) (as substituted): Mental Health (After-care under Supervision) Regulations 1996, SI 1996/294, reg 2(3) (amended by SI 2002/2469). Where a local social services authority has or will have a duty under the Mental Health Act 1983 s 117 (as amended) to provide after-care services to a patient, and where the health authority or primary care trust which also has or will have a duty with respect to the patient has given an authorisation to, or made arrangements with, a person or body under the Mental Health (After-care under Supervision) Regulations 1996, SI 1996/294, reg 2(2) or reg 2(3) (as amended), the local social services authority may authorise the same person or body to perform all of that local social services authority's functions under the relevant provisions in respect of the patient: reg 2(4) (amended by SI 2002/2469). Nothing in the Mental Health (After-care under Supervision) Regulations 1996, SI 1996/294, reg 2 (as amended) permits a health authority or primary care trust or local social services authority to authorise a person or body to exercise the functions under the Mental Health Act 1983 s 25E(1), (3) (as added) (see PARA 531 post) so far as they relate to review and modification of after-care services provided or to be provided to a patient under s 117 (as amended): Mental Health (After-care under Supervision) Regulations 1996, SI 1996/294, reg 2(5) (amended by SI 2002/2469).

As to the extent of the duty see *Clunis v Camden and Islington Health Authority* [1998] 3 All ER 180, 40 BMLR 181, CA (health authority not liable to a discharged patient for deterioration of his condition consequent upon his killing a stranger once at large; statutory obligations of the health authority to provide him with after-care did not give rise to a common law duty of care); *W v Doncaster Metropolitan Borough Council* [2004] EWCA Civ 378, [2004] LGR 743 (provided that a local authority used its best endeavours to fulfil any conditions imposed by a mental health review tribunal in respect of the conditional discharge from a secure hospital of a restricted patient, it will meet its obligations both under the Mental Health Act 1983 s 117 (as amended) in regard to its duty to provide after-care to the patient, and under the European Convention on Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq)); *R (on the application of B) v Camden London Borough Council* [2005] EWHC 1366 (Admin), [2005] All ER (D) 43 (Jul) (the Mental Health Act 1983 s 117 (as amended) does not impose an obligation on authorities to monitor patients whilst detained with a view to the provision of after-care services; such a duty is only imposed once a person has ceased to be detained and has left hospital). No charge may be made for the services required under the Mental Health Act 1983 s 117 (as amended): *R (on the application of Stennett) v Manchester City Council*, *R (on the application of Armstrong) v Redcar and Cleveland Borough Council*, *R (on the application of Cobham) v Harrow London Borough Council* [2002] UKHL 34, [2002] 4 All ER 124.

UPDATE

414 General responsibilities

TEXT AND NOTES 6-9--The Secretary of State may give financial assistance to qualifying bodies which are engaged in the provision of social care services provided under the Mental Health Act 1983 s 117: see the Health and Social Care Act 2008 ss 149-156; and PARA 428.

TEXT AND NOTE 6--For 'health authority' read 'local health board': 1983 Act s 117(3) (further amended by the References to Health Authorities Order 2007, SI 2007/961). For the meaning of 'local health board' see PARA 526.

NOTE 6--Definition of 'primary care trust' in 1983 Act s 145(1) amended and definition of 'health authority' repealed: National Health Service (Consequential Provisions) Act 2006 Sch 1 para 70(a), (e).

NOTE 7--'Resident' in s 117 means settled presence in a particular place other than under compulsion: *R (on the application of JM) v Hammersmith and Fulham LBC*; *R (on the application of Hertfordshire CC) v Hammersmith and Fulham LBC* [2010] EWHC 562 (Admin), [2010] All ER (D) 218 (Mar).

NOTE 9--References to after-care services provided for a patient under the Mental Health Act 1983 s 117 include references to services provided for the patient in respect of which direct payments are made under regulations under the Health and Social Care Act 2001 s 57 or the National Health Service Act 2006 s 12A(4), and which would be provided under the Mental Health Act 1983 s 117 apart from the regulations: s 117(2C) (added by the Health Act 2009 Sch 1 para 3).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(4) HEALTH AND HOSPITAL SERVICES/415. Hospital and specialist services.

415. Hospital and specialist services.

Except for hospitals providing high security psychiatric services¹, hospitals and specialist services for the treatment of mental disorder are administered on behalf of the Secretary of State², subject to his directions and to regulations, by health authorities³, strategic health authorities, special health authorities⁴, primary care trusts⁵ and local health boards⁶ and by NHS trusts⁷.

1 As to the duty to provide high security psychiatric services see PARA 418 post.

2 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

3 For the meaning of 'health authority' see PARA 414 note 6 ante.

4 For the meaning of 'special health authority' see PARA 410 note 10 ante.

5 For the meaning of 'primary care trust' see PARA 414 note 6 ante.

6 For the details of local administration see the National Health Service Act 1977 ss 8-18A (as amended); and HEALTH SERVICES vol 54 (2008) PARA 74 et seq.

7 Ie established under the National Health Service and Community Care Act 1990 s 5 (as amended): see HEALTH SERVICES vol 54 (2008) PARA 155 et seq.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(4) HEALTH AND HOSPITAL SERVICES/416. Hospitals to which patients may be admitted.

416. Hospitals to which patients may be admitted.

Patients¹ suffering from mental disorder² may be admitted, whether as informal patients³ or compulsorily⁴, to any hospital⁵; or they may be admitted as informal patients, or in some cases compulsorily⁶, to a registered establishment⁷. It is the duty of every primary care trust or health authority⁸ to notify every social services authority for an area wholly or partly within the health authority's area of the hospital or hospitals administered by or otherwise available to the health authority in which there are arrangements for the reception in specially urgent cases of patients requiring treatment for mental disorder⁹. It is also the duty of a primary care trust or health authority to provide at the request of a court which is minded to make a hospital order such information as it has or can reasonably obtain about hospitals in its own area or elsewhere which might be able to admit the person concerned¹⁰.

1 For the meaning of 'patient' generally see PARA 435 post.

2 For the meaning of 'mental disorder' see PARA 402 ante.

3 See the Mental Health Act 1983 s 131 (as amended); and PARA 437 post.

4 As to compulsory admission see PARA 460 et seq post; and as to admission by court order see PARA 486 et seq post. As to transfer of prisoners see PARA 535 et seq post.

5 For the meaning of 'hospital' under the Mental Health Act 1983 see PARA 417 post.

6 See PARA 417 post.

7 For the meaning of 'registered establishment' see PARA 421 post. See also SOCIAL SERVICES AND COMMUNITY CARE.

8 For the meanings of 'primary care trust' and 'health authority' see PARA 414 note 6 ante.

9 Mental Health Act 1983 s 140 (amended by the National Health Service and Community Care Act 1990 s 66(1), Sch 9 para 24(8); the Health Authorities Act 1995 s 2(1), Sch 1 para 107; and the National Health Service Reform and Health Care Professions Act 2002 s 2(5), Sch 2 paras 42, 48).

10 Mental Health Act 1983 s 39(1), (2) (amended by Health Authorities Act 1995 Sch 1 para 107; and the National Health Service Reform and Health Care Professions Act 2002 Sch 2 paras 42, 46). The Mental Health Act 1983 s 39 (as amended) has effect as if any reference to the making of a hospital order included a reference to the giving of a hospital direction and a limitation direction (see PARA 490 post): s 45A(8) (added by the Crime (Sentences) Act 1997 s 46).

UPDATE

416 Hospitals to which patients may be admitted

TEXT AND NOTE 9--Mental Health Act 1983 s 140 further amended: Mental Health Act 2007 s 31(4); SI 2007/961.

TEXT AND NOTE 10--Mental Health Act 1983 s 39(1) further amended: SI 2007/961.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(4) HEALTH AND HOSPITAL SERVICES/417. Meaning of 'hospital'.

417. Meaning of 'hospital'.

In the Mental Health Act 1983, 'hospital' means: (1) any health service hospital within the meaning of the National Health Service Act 1977¹, which includes a hospital providing high security psychiatric services²; (2) any accommodation provided by a local authority and used as a hospital by or on behalf of the Secretary of State under the National Health Service Act 1977³.

In Parts II and III of the Mental Health Act 1983⁴, relating to compulsory admission and guardianship and patients concerned in criminal proceedings or under sentence, 'hospital' also includes, except where otherwise expressly provided⁵, a registered establishment⁶.

¹ I.e. a hospital vested in the Secretary of State for the purposes of his functions under the National Health Service Act 1977 or vested in a primary care trust, an NHS trust or an NHS foundation trust: s 128(1) (definition amended by the Health Services Act 1980 ss 1, 2, Sch 1 para 77(d); the National Health Service and Community Care Act 1990 s 26(2)(c); the Health Act 1990 s 65, Sch 4 paras 4, 38(1), (2)(a); and the Health and Social Care (Community Health and Standards) Act 2003 s 34, Sch 4 paras 23, 42). For the meaning of 'primary care trust' see PARA 414 note 6 ante. As to NHS trusts and NHS foundation trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq. As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

² As to hospitals providing high security psychiatric services see PARA 418 et seq post.

³ Mental Health Act 1983 s 145(1). As to such accommodation see SOCIAL SERVICES AND COMMUNITY CARE.

⁴ I.e. ibid Pt II (ss 2-34) (as amended), Pt III (ss 35-55) (as amended).

⁵ I.e. by ibid s 46(1) (as amended) (persons ordered to be kept in custody during Her Majesty's pleasure), s 47(1) (as amended) or s 48(1) (transfer of certain prisoners to hospital): see PARAS 535-536 post.

⁶ See ibid ss 34(2), 55(5), 145(1) (s 34(2) amended by the Care Standards Act 2000 s 116, Sch 4 para 9(1), (4)(b)). For the meaning of 'registered establishment' see PARA 421 post.

UPDATE

417 Meaning of 'hospital'

TEXT AND NOTE 3--In definition of 'hospital' in 1983 Act s 145(1) for 'National Health Service Act 1977' read 'National Health Service Act 2006 or the National Health Service (Wales) Act 2006': National Health Service (Consequential Provisions) Act 2006 Sch 1 para 70(c).

Definition of 'hospital' further amended to include any hospital as defined by the National Health Service (Wales) Act 2006 s 206 which is vested in a local health board: 1983 Act s 145(1) (amended by Mental Health Act 2007 s 46(3)(a)).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(4) HEALTH AND HOSPITAL SERVICES/418. Hospitals providing high security psychiatric services.

418. Hospitals providing high security psychiatric services.

The duty imposed on the Secretary of State¹ to provide services for the purposes of the health service includes a duty to provide hospital accommodation and services for persons who are liable to be detained under the Mental Health Act 1983 and in his opinion require treatment under conditions of high security on account of their dangerous, violent or criminal propensities². Such hospital accommodation and services³ are referred to⁴ as 'high security psychiatric services'⁵.

1 le by the National Health Service Act 1977 s 1: see PARAS 410, 414 ante; and HEALTH SERVICES vol 54 (2008) PARA 10 et seq. As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

2 Ibid s 4(1) (s 4 substituted by the Health Act 1999 s 41(1)).

3 le as mentioned in the National Health Service Act 1977 s 4(1) (as substituted) (see the text and notes 1-2 supra).

4 le for the purposes of the National Health Service Act 1977. See also note 5 infra.

5 Ibid s 4(2) (as substituted: see note 2 supra). For the purposes of the Mental Health Act 1983, 'high security psychiatric services' has the same meaning as in the National Health Service Act 1977: Mental Health 1983 s 145(1) (definition added by the Health Act 1999 s 65, Sch 4 paras 65, 69(1), (2)(a)). High security psychiatric services must be provided only at hospital premises at which services are provided only for the persons mentioned in the National Health Service Act 1977 s 4(1) (as substituted) (see the text and notes 1-2 supra): see s 4(3) (as so substituted). 'Hospital premises' means: (1) a hospital; or (2) any part of a hospital which is treated as a separate unit: s 4(3) (as so substituted). Where high security psychiatric services and other services are provided at a hospital, the part of the hospital at which high security psychiatric services are provided and the other part must be treated as separate hospitals for the purposes of the Mental Health Act 1983: s 145(1AA) (added by the Health Act 1999 s 65, Sch 4 paras 65, 69(1), (3)). For the meaning of 'hospital' see PARA 417 ante.

Such hospitals providing high security psychiatric services replace 'special hospitals'. The Special Hospitals Service Authority has been abolished (see the Special Hospitals Service Authority (Abolition) Order 1996, SI 1996/490, art 2), but provision is made for the enforceability of rights and liabilities and accounts of the old authority (see arts 3-4).

UPDATE

418 Hospitals providing high security psychiatric services

TEXT AND NOTES--For consolidation of health service enactments see National Health Service Act 2006, National Health Service (Wales) Act 2006 and National Health Service (Consequential Provisions) Act 2006; and HEALTH SERVICES.

NOTE 5--In definition of 'high security psychiatric services' in 1983 Act s 145(1) for 'National Health Service Act 1977' read 'National Health Service Act 2006 s 4 or the National Health Service (Wales) Act 2006 s 4': National Health Service (Consequential Provisions) Act 2006 Sch 1 para 70(b).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(4) HEALTH AND HOSPITAL SERVICES/419. Admission to, and transfer or discharge from, hospitals providing high security psychiatric services.

419. Admission to, and transfer or discharge from, hospitals providing high security psychiatric services.

The ordinary statutory procedures for the compulsory admission, transfer and discharge of patients to and from hospitals¹ apply in the case of hospitals where high security psychiatric services² are provided³. However, without prejudice to any provisions with respect to the transfer of patients⁴: (1) any patient⁵ who is for the time being liable to be detained in a hospital at which high security psychiatric services are provided may, on the directions of the Secretary of State⁶, be removed at any time into any other hospital at which those services are provided⁷; and (2) the Secretary of State may give directions for the transfer of any patient who is so liable to be detained into a hospital at which those services are not provided⁸.

1 Ie under the Mental Health Act 1983 Pt II (ss 2-34) (as amended), Pt III (ss 35-55) (as amended): see PARAS 460-468, 486-501, 535-541 post. For the meaning of 'hospital' see PARA 417 ante.

2 As to hospitals providing high security psychiatric services see PARA 418 ante.

3 See the definition of 'hospital' in the Mental Health Act 1983 s 145(1); and PARA 417 ante. Thus there is no category of compulsory patient who must, or must not, be sent to a hospital providing high security psychiatric services; the majority are subject to restriction orders (see PARAS 496, 498-499 post) or transferred from prison (see PARA 535 et seq post), but some are subject to ordinary hospital orders (see PARA 491 post) and some to applications for admission for treatment (see PARA 461 post).

4 Ie ibid s 19 (as amended): see PARA 511 et seq post.

5 Ie except one remanded to hospital under ibid ss 35, 36 (see PARA 489 post), or subject to an interim hospital order under s 38 (as amended) (see PARA 491 post).

6 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

7 Mental Health Act 1983 s 123(1) (amended by the Health Act 1999 s 65, Sch 4 paras 65, 67(a), Sch 5). See PARA 517 post. The provisions of the Mental Health Act 1983 s 19(2), (4) (see PARA 515 post) apply in relation to transfer or removal under s 123 (as amended) as they apply in relation to transfer or removal from one hospital to another: s 123(3).

8 Ibid s 123(2) (amended by the Health Act 1999 Sch 4 paras 65, 67(b)). See PARA 517 post. See also s 123(3); and note 7 supra.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(4) HEALTH AND HOSPITAL SERVICES/420. Travelling expenses of visitors to patients in hospitals providing high security psychiatric services.

420. Travelling expenses of visitors to patients in hospitals providing high security psychiatric services.

In accordance with arrangements made by him with Treasury¹ approval, the Secretary of State² may make payments, at such rates as may be determined under those arrangements, to persons of such class or description as may be so determined in respect of travelling expenses necessarily incurred by them in making visits to patients for the time being detained in hospitals at which high security psychiatric services are provided³.

1 As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.

2 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

3 Health Services and Public Health Act 1968 s 66(1) (amended by the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(2), Sch 2 para 2). As to hospitals providing high security psychiatric services see PARAS 418-419 ante. As to visiting patients generally see Code of Practice (1999) ch 26; and PARA 444 post. As to the Code of Practice (1999) see PARA 436 post.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(4) HEALTH AND HOSPITAL SERVICES/421. Meaning of 'registered establishment'.

421. Meaning of 'registered establishment'.

A 'registered establishment' means an establishment which would not¹ be a hospital² for the purposes of Part II of the Mental Health Act 1983³, and in respect of which a person is registered under Part II of the Care Standards Act 2000⁴ as an independent hospital⁵ in which treatment or nursing (or both) are provided for persons liable to be detained under the Mental Health Act 1983⁶.

1 Ie apart from the Mental Health Act 1983 s 34(2) (as amended) (see PARA 417 ante).

2 For the meaning of 'hospital' see PARA 417 ante.

3 Ie the Mental Health Act 1983 Pt II (ss 2-34) (as amended).

4 Ie the Care Standards Act 2000 Pt II (ss 11-42) (as amended; prospectively amended). As to such registration see PARA 432 post; and SOCIAL SERVICES AND COMMUNITY CARE.

5 'Independent hospital' means a hospital which is not a health service hospital: see the Care Standards Act 2000 s 2(2); applied by the Mental Health Act 1983 s 145(1) (definition added by the Care Standards Act 2000 s 116, Sch 4 para 9(1), (10)(b)). As to health service hospitals see HEALTH SERVICES vol 54 (2008) PARA 21.

6 Mental Health Act 1983 ss 34(1), 145(1) (definitions added by the Care Standards Act 2000 Sch 4 para 9(1), (4), (10)(d)).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(4) HEALTH AND HOSPITAL SERVICES/422. Mental nurses.

422. Mental nurses.

The Nursing and Midwifery Council prepares and maintains a register of qualified nurses, midwives and specialist public health nurses¹. The part of the register relating to nurses is divided into two sub-parts, sub-part 1 and sub-part 2². The entries in the register are to include such entry as the Council considers appropriate to indicate a qualification held by, or field of practice of, a registrant; and these include in the case of a nurse registered in the nurses register sub-part 1 a recordable qualification in mental health nursing and the field of practice of mental health nursing, and in the case of a nurse registered in the nurses register sub-part 2 the field of practice of mental health nursing³.

1 See the Nurses and Midwives (Parts of and Entries in the Register) Order of Council 2004, SI 2004/1765, art 2; and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 719. As to the Nursing and Midwifery Council see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 691 et seq.

2 See *ibid* Sch 1; and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 719.

3 See *ibid* art 7(1), (3), (5), (6); and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 719.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(4) HEALTH AND HOSPITAL SERVICES/423. Pensions.

423. Pensions.

Statutory authority for the payment of pension benefits to persons employed in the mental health services is the same as that for other employees of the national health service¹, although special provision is made for mental health officers².

1 I.e. the National Health Service Pension Scheme Regulations 1995, SI 1995/300 (as amended): see HEALTH SERVICES vol 54 (2008) PARA 717 et seq.

2 See *ibid* reg R3 (amended by SI 2000/605). See also HEALTH SERVICES vol 54 (2008) PARA 737.

UPDATE

423 Pensions

TEXT AND NOTE 2--SI 1995/300 reg R3 further amended: SI 2006/2919.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(5) SOCIAL SERVICES/424. Meaning of 'local social services authority'.

(5) SOCIAL SERVICES

424. Meaning of 'local social services authority'.

Under the Mental Health Act 1983, 'local social services authority' means a council which is a local authority for the purposes of the Local Authority Social Services Act 1970¹, that is, the council of a non-metropolitan county, the council of a metropolitan district or a London borough, or the Common Council of the City of London or, in relation to Wales², the councils of the counties and county boroughs³. This definition is also adopted by the National Health Service Act 1977⁴.

1 Mental Health Act 1983 s 145(1).

2 For the meaning of 'Wales' see PARA 405 note 7 ante.

3 See the Local Authority Social Services Act 1970 s 1 (amended by the Local Government Act 1972 s 195(1), (3); and the Local Government (Wales) Act 1994 s 22(4), Sch 10 para 7). See SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1005. As to local government areas and authorities in England and Wales see LOCAL GOVERNMENT vol 69 (2009) PARAS 24 et seq, 37 et seq. As to London boroughs and the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 35. In relation to the Isles of Scilly, a local social services authority means the Council of the Isles of Scilly: see PARA 405 note 8 ante; and LOCAL GOVERNMENT vol 69 (2009) PARA 36; SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1005.

4 See the National Health Service Act 1977 s 128(1) (definition amended by the Local Government (Wales) Act 1994 Sch 10 para 11(3)(b)). There is a similar definition in the Health Service Commissioners Act 1993 s 19 (definition amended by the Local Government (Wales) Act 1994 s 66, Sch 16 para 108, Sch 18).

UPDATE

424 Meaning of 'local social services authority'

TEXT AND NOTE 4--1977 Act now as consolidated: see National Health Service Act 2006, National Health Service (Wales) Act 2006; and HEALTH SERVICES.

NOTE 4--Local Government (Wales) Act 1994 Sch 10 para 11 repealed: National Health Service (Consequential Provisions) Act 2006 Sch 4. Local Government (Wales) Act 1994 Sch 16 para 108 repealed: Public Services Ombudsman (Wales) Act 2005 Sch 7.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(5) SOCIAL SERVICES/425. General functions of local social services authorities.

425. General functions of local social services authorities.

The care of mentally disordered people¹ living in the community falls principally upon the local social services authority². Its functions fall into the following broad categories³: (1) to provide residential accommodation for those aged 18 or over who need care and attention because of age, illness, disability or any other circumstances⁵; (2) to provide occupational, recreational and other services for persons aged 18 or over suffering from certain disabilities⁶, including mental disorder of any description⁷; (3) to set up a register⁸ and provide home adaptations and other facilities⁹ for disabled persons¹⁰; (4) to promote the welfare of old people¹¹; (5) to provide services for the prevention, care and after-care of illness¹², including mental disorder; (6) to perform various functions under the Mental Health Act 1983, including: (a) acting as guardian or approving and supervising the appointment of others to act as guardians of mentally disordered persons¹³; (b) appointing and providing the services of approved social workers¹⁴; (c) providing after-care for certain formerly detained patients¹⁵; (d) making social reports to hospitals¹⁶; (e) visiting certain patients in hospital¹⁷; and (f) prosecuting certain offences¹⁸.

Where a local social services authority is required¹⁹ to make any record or report, that function may be performed by an officer authorised in that behalf by that authority²⁰.

1 For the meaning of 'mentally disordered' see PARA 402 ante.

2 Generally this is the local social services authority for the area where the person concerned lives. For the meaning of 'local social services authority' see PARA 424 ante.

3 As to the provision of accommodation and welfare services by local social services authorities see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1020 et seq. A strategic plan for the provision of community care services must be prepared and published: National Health Service and Community Care Act 1990 s 46 (amended by the Local Government (Wales) Act 1994 s 22(4), Sch 10 para 14; the Health Authorities Act 1995 ss 2(1), 5(1), Sch 1 para 80, Sch 3; and the Health, Social Care and Well-being Strategies (Wales) Regulations 2003, SI 2003/154, reg 7(6), Schedule paras 3-4). 'Community care services' consist of services under the National Assistance Act 1948 Pt III (ss 21-35) (as amended), the Health Service and Public Health Act 1968 s 45 (as amended), the National Health Service Act 1977 s 21, Sch 8 (as amended), and the Mental Health Act 1983 s 117 (as amended): National Health Service and Community Care Act 1990 s 46(3). See SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1012.

5 National Assistance Act 1948 s 21(1)(a) (amended by the Local Government Act 1972 s 195(6), Sch 23 para 2(1); the Children Act 1989 s 108(5), Sch 13 para 11(1); and the National Health Service and Community Care Act 1990 s 42(1)). As to the provision of such accommodation see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1029 et seq.

6 As to the provision of such services see the National Assistance Act 1948 s 29 (as amended); and SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1020 et seq.

7 Ibid s 29(1) (amended by the Mental Health (Scotland) Act 1960 ss 113(1), 114, Sch 4; the Local Government Act 1972 Sch 23 para 2(4); and the Children Act 1989 Sch 13 para 11(2), Sch 14 para 1).

8 Chronically Sick and Disabled Persons Act 1970 s 1 (amended by the Disabled Persons (Services, Consultation and Representation) Act 1986 s 9).

9 Chronically Sick and Disabled Persons Act 1970 s 2 (amended by the Local Authorities Social Services Act 1970 s 14(1), Sch 2 para 12; the Local Government Act 1972 s 272(1), Sch 30; and the National Health Service and Community Care Act 1990 s 66, Sch 9 para 12, Sch 10).

10 Ie those to whom the National Assistance Act 1948 s 29 (as amended) applies: see the text and notes 6-7 supra; and SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1020 et seq.

11 Health Services and Public Health Act 1968 s 45 (amended by the Local Authority Social Services Act 1970 s 14(2), Sch 3; the Local Government Act 1972 Sch 23 para 15(3); the National Health Service Reorganisation Act 1973 ss 57, 58, Sch 4 para 121; the National Health Service Act 1977 s 129, Sch 15 para 43; the Statute Law (Repeals) Act 1978 s 1, Sch 1 Pt XII; the Residential Homes Act 1980 s 11(5), Sch 2; the Health and Social Services and Social Security Adjudications Act 1983 s 30, Sch 10 Pt I; the National Health Service and Community Care Act 1990 s 42(7), Sch 10; the Immigration and Asylum Act 1999 s 117; the Nationality, Immigration and Asylum Act 2002 s 45; and by virtue of the Secretary of State for Social Services Order 1968, SI 1968/1699). See SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1024.

12 National Health Service Act 1977 s 21, Sch 8 para 2 (amended by the Mental Health Act 1983 s 148(1), Sch 4 para 47(e); the Health and Social Services and Social Security Adjudications Act 1983 Sch 10 Pt I; the Children Act 1989 s 108(4), (7), Sch 12 para 34, Sch 15; the National Health Service and Community Care Act 1990 Sch 9 para 18(4), Sch 10; the Immigration and Asylum Act 1999 s 117(2); and prospectively amended by the Nationality, Immigration and Asylum Act 2002 s 45(7)). See PARA 426 post; and SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1026.

13 See the Mental Health Act 1983 ss 7(5), 8-10, 37(1), (6) (s 37(1) as amended); and PARAS 469-479, 502-503 post. As to the duty of the local social services authority, on request, to inform a court which is minded to make a guardianship order whether the authority or any other person is willing to receive the offender into guardianship, and if so how the guardian could be expected to exercise the statutory powers, see s 39A (as added); and PARA 502 post.

14 Ibid ss 114, 145(1). As to the appointment and functions of approved social workers see PARAS 427, 450-451 post.

15 See ibid s 117 (as amended); and PARA 428 post.

16 See ibid s 14; and PARA 429 post.

17 See ibid s 116 (as amended); and PARA 430 post.

18 See PARA 431 post.

19 Ie under the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893 (as amended).

20 Ibid reg 3(6). As to signature and proof of documents, including records and reports, see PARA 449 post.

UPDATE

425 General functions of local social services authorities

TEXT AND NOTES--For consolidation of health service enactments see National Health Service Act 2006, National Health Service (Wales) Act 2006 and National Health Service (Consequential Provisions) Act 2006; and HEALTH SERVICES.

NOTE 3--Definition of 'community care services' in 1990 Act s 46(3) amended: National Health Service (Consequential Provisions) Act 2006 Sch 1 para 129.

NOTE 12--Children Act 1989 Sch 12 para 34 and Immigration and Asylum Act 1999 s 117(2) repealed: National Health Service (Consequential Provisions) Act 2006 Sch 4.

TEXT AND NOTE 14--Reference to approved social workers now to approved mental health professionals: see PARA 427.

NOTES 19, 20--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(5) SOCIAL SERVICES/426. Functions in relation to the prevention of illness, care and after-care.

426. Functions in relation to the prevention of illness, care and after-care.

A local social services authority¹ may, with the approval of the Secretary of State², and must, to such extent as he may direct, make arrangements for the purpose of the prevention of illness, for the care of persons³ suffering from illness, and for the after-care of persons who have been suffering⁴. In particular, this includes arrangements for: (1) the provision of centres or other facilities for training and suitable occupation, the equipment and maintenance of such centres⁵, and the provision of ancillary and supplemental services for people using them⁶; and (2) the exercise of the functions of the authority in respect of persons suffering from mental disorder⁷ who are received into guardianship⁸ (whether that of the local social services authority or of other persons)⁹.

The Secretary of State may make regulations as to the conduct of premises in which, in pursuance of the above arrangements, are provided, for persons whose care is undertaken with a view to preventing them from becoming sufferers from mental disorder within the meaning of the Mental Health Act 1983 or who are, or have been, so suffering, facilities for training them or keeping them suitably occupied¹⁰.

1 For the meaning of 'local social services authority' see PARA 424 ante.

2 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

3 This power does not apply to persons under 18: see the National Health Service Act 1977 s 21, Sch 8 para 2(4A) (added by the Children Act 1989 s 108(4), Sch 12 para 34).

4 National Health Service Act 1977 Sch 8 para 2(1).

5 Ibid Sch 8 para 2(1)(b). Such an authority neither has the power nor is subject to a duty to make under Sch 8 para 2 (as amended) arrangements to provide facilities for any of the purposes mentioned in the Disabled Persons (Employment) Act 1944 s 15(1) (as amended) (see EMPLOYMENT vol 39 (2009) PARAS 538-539): National Health Service Act 1977 Sch 8 para 2(1). No arrangements under Sch 8 para 2 (as amended) may provide for the payment of money to persons for whose benefit they are made except in so far as they may provide for the remuneration of such persons engaged in suitable work in accordance with the arrangements of such amounts as the local social services authority think fit in respect of their occasional personal expenses where it appears to that authority that no such payment would otherwise be made: Sch 8 para 2(2) (amended by the Children's Act 1989 s 108(7), Sch 15). No authority is authorised or may be required under the National Health Service Act 1977 Sch 8 para 2 (as amended) to provide residential accommodation: Sch 8 para 2(4AA) (added by the National Health Service and Community Care Act 1990 s 66(1), Sch 9 para 18(14)).

No arrangements under the National Health Service Act 1977 Sch 8 para 2 (as amended) may be given effect in relation to a person to whom the Immigration and Asylum Act 1999 s 115 (as amended) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 257) applies solely because he is destitute or because of the physical effects, or anticipated physical effects, of his being destitute: National Health Service Act 1977 Sch 8 para 2(2A) (Sch 8 para 2(2A), (2B) added by the Immigration and Asylum Act 1999 s 117(2)). The provisions of the Immigration and Asylum Act 1999 s 95(3), (5)-(8), Sch 8 para 2 (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM) apply for the purposes of the National Health Service Act 1977 Sch 8 para 2(2A) (as added) as they apply for the purposes of the Immigration and Asylum Act 1999 s 95, but the references in s 95(5), (7), Sch 8 para 2 to the Secretary of State are to be read as references to a local social services authority: National Health Service Act 1977 Sch 8 para 2(2B) (as so added). As from a day to be appointed, Sch 8 para 2(2B) (as added) is substituted so as to provide that the provisions of the Immigration and Asylum Act 1999 s 95(2)-(7) are to apply for the purposes of the National Health Service Act 1977 Sch 8 para 2(2A) (as added), and for that purpose a reference to the Secretary of State in the Immigration and Asylum Act 1999 s 95(4) or (5) is to be treated as a reference to a local social services authority: National Health Service Act 1977 Sch 8 para 2(2B) (as so added; prospectively substituted by the Nationality, Immigration and Asylum Act 2002 s 45(7)). At the date at which this volume states the law no such day had been appointed.

6 National Health Service Act 1977 Sch 8 para 2(1)(c). See note 5 supra.

7 For the meaning of 'mental disorder' see PARA 402 ante.

8 He received into guardianship under the Mental Health Act 1983 Pt II (ss 2-34) (as amended) or Pt III (ss 35-55) (as amended); see PARAS 469-479, 502-503 post.

9 National Health Service Act 1977 Sch 8 para 2(1)(d) (substituted by the Mental Health Act 1983 s 148(1), Sch 4 para 47(e)).

10 National Health Service Act 1977 Sch 8 para 2(3) (amended by the Mental Health Act 1983 Sch 4 para 47(e); and the National Health Service and Community Care Act 1990 Sch 9 para 18(4), Sch 10).

UPDATE

426 Functions in relation to the prevention of illness, care and after-care

TEXT AND NOTES--For consolidation of health service enactments see National Health Service Act 2006; National Health Service (Wales) Act 2006; National Health Service (Consequential Provisions) Act 2006; and HEALTH SERVICES.

NOTES 3, 5--Children Act 1989 Sch 12 para 34 and Immigration and Asylum Act 1999 s 117(2) repealed: National Health Service (Consequential Provisions) Act 2006 Sch 4.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(5) SOCIAL SERVICES/427. Approved social workers.

427. Approved social workers.

An 'approved social worker' is an officer of a local social services authority¹ appointed to act as an approved social worker for the purposes of the Mental Health Act 1983². Each local social services authority must appoint a sufficient number of social workers, approved by the authority³ as having appropriate competence in dealing with people suffering from mental disorder⁴, to discharge the functions of approved social workers under the Mental Health Act 1983⁵.

An approved social worker of a local social services authority has power⁶ at all reasonable times to enter and inspect⁷ any premises, not being a hospital⁸, in which a mentally disordered patient is living, if he has reasonable cause to believe that the patient is not under proper care⁹. Obstruction of the approved social worker in the course of his inspection is an offence¹⁰.

1 For the meaning of 'local social services authority' see PARA 424 ante.

2 Mental Health Act 1983 s 145(1).

3 I.e. having regard to such matters as the Secretary of State may direct: *ibid* s 114(3). As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

4 *Ibid* s 114(2).

5 *Ibid* s 114(1). As to the functions and duties of approved social workers under the Mental Health Act 1983 see PARAS 450-451 post.

6 The power can only be exercised within the area of the approved social worker's employing authority.

7 If required to do so, the social worker must produce some duly authenticated document showing him to be an approved social worker of the local social services authority for the area concerned: Mental Health Act 1983 s 115. The right of entry is not dependent upon someone being available to whom the document can be produced: *Grove v Eastern Gas Board* [1952] 1 KB 77, [1951] 2 All ER 1051, CA. If forcible entry is necessary, a warrant must be obtained (see the Mental Health Act 1983 s 135(1) (amended by the Police and Criminal Evidence Act 1984 s 119(2), Sch 7 Pt I)), and the constable to whom the warrant is addressed must be accompanied by an approved social worker and a registered medical practitioner (see the Mental Health Act 1983 s 135(4) (amended by the Police and Criminal Evidence Act 1984 Sch 6 Pt I para 26)). See also PARA 549 post. For the meaning of 'registered medical practitioner' see PARA 460 note 13 post. As to the office of constable see POLICE vol 36(1) (2007 Reissue) PARA 101 et seq.

8 For the meaning of 'hospital' see PARA 417 ante. For inspections in relation to registered establishments under the Care Standards Act 2000 see SOCIAL SERVICES AND COMMUNITY CARE. For the meaning of 'registered establishment' see PARA 421 ante.

9 Mental Health Act 1983 s 115.

10 See *ibid* s 129(1) (as amended); and PARA 772 post.

UPDATE

427 Approved [mental health professionals]

TEXT AND NOTES--References to social worker now to mental health professional: Mental Health Act 1983 ss 114, 115, 135(1), (4), 145(1) (ss 114, 115 substituted, ss 135(1), (4), 145(1) amended, by Mental Health Act 2007 s 18, Sch 2 paras 8, 10(a), 11). See Mental Health (Approved Mental Health Professionals) (Approval) (England)

Regulations 2008, SI 2008/1206. The relevant Council (ie the General Social Care Council or the Care Council for Wales, as the case may be) may, in accordance with rules made by it, approve courses for persons who are or wish to become approved mental health professionals. Mental Health Act 2007 s 114A (added by Mental Health Act 2007 s 19).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(5) SOCIAL SERVICES/428. Provision of after-care.

428. Provision of after-care.

The primary care trust or health authority¹ and the local social services authority² have a duty³ to provide, in co-operation with the relevant voluntary agencies, after-care services⁴ for certain persons⁵. Such duty continues until such time as those authorities are satisfied that the person concerned is no longer in need of such services⁶.

In addition, it is the duty of the primary care trust or health authority to secure that at all times while a patient is subject to after-care under supervision: (1) a person who is a registered medical practitioner approved⁷ by the Secretary of State⁸ as having special experience in the diagnosis or treatment of mental disorder⁹ is in charge of the medical treatment¹⁰ provided for the patient as part of the after-care services provided for him¹¹; and (2) a person professionally concerned with any of the after-care services so provided is supervising him with a view to securing that he receives the after-care services so provided¹².

1 For the meanings of 'primary care trust' and 'health authority' see PARA 414 note 6 ante. See also the Mental Health Act 1983 s 117(3) (as amended); and PARA 414 ante.

2 For the meaning of the 'local social services authority' for these purposes see PARA 414 note 7 ante.

3 The duty is not absolute, and the nature and extent of the services provided is at the discretion of the authority: *R (on the application of K) v Camden and Islington Health Authority* [2001] EWCA Civ 240, [2002] QB 198. See also *W v Doncaster Metropolitan Borough Council* [2004] EWCA Civ 378, [2004] All ER (D) 49 (May) (authority not in breach of its duty under the Mental Health Act 1983 s 117 (as amended)); *R (on the application of B) v Camden London Borough Council* [2005] EWHC 1366 (Admin), [2005] All ER (D) 43 (Jul) (authority under no duty to monitor patients while detained).

4 The Mental Health Act 1983 does not specify what services are to be provided. No charge may be made for the services required under s 117 (as amended): *R (on the application of Stennett) v Manchester City Council, R (on the application of Armstrong) v Redcar and Cleveland Borough Council, R (on the application of Cobham) v Harrow London Borough Council* [2002] UKHL 34, [2002] 4 All ER 124.

5 See the Mental Health Act 1983 s 117(2) (as amended); and PARA 414 note 9 ante. As to such persons see s 117(1) (as amended); and PARA 414 note 8 ante.

The local authority also has a duty to carry out an assessment of needs for community care services: see the National Health Service and Community Care Act 1990 s 47 (as amended); para 414 note 2 ante; and SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1015 et seq. As to the entitlement to community care assessment see *R (on the application of HP) v Islington London Borough Council* [2004] EWHC 7 (Admin), [2004] All ER (D) 71 (Jan). See also *R (on the application of B) v Camden London Borough Council* [2005] EWHC 1366 (Admin), [2005] All ER (D) 43 (Jul).

6 See the Mental Health Act 1983 s 117(2) (amended by the Health Authorities Act 1995 s 2(1), Sch 1 para 107(1), (8)(a); the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 15(1), (3); and the National Health Service Reform and Health Care Professions Act 2002 s 2(5), Sch 2 Pt 2 paras 42, 47). See also PARA 414 note 9 ante. However, they cannot not be so satisfied in the case of a patient who is subject to after-care under supervision at any time while he remains so subject: see the Mental Health Act 1983 s 117(2) (as so amended). For the meaning of 'patient' see PARA 435 post. As to after-care under supervision see PARA 528 et seq post.

7 Is approved under *ibid* s 12 (as amended) (see PARA 482 post).

8 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

9 For the meaning of 'mental disorder' see PARA 402 ante.

10 As to the meaning of 'medical treatment' see PARA 552 post.

11 Mental Health Act 1983 s 117(2A)(a) (s 117(2A), (2B) added by the Mental Health (Patients in the Community) Act 1995 Sch 1 para 15(4); and the Mental Health Act 1983 s 117(2A) amended by the National Health Service Reform and Health Care Professions Act 2002 s 2(5), Sch 2 Pt 2 paras 42, 47).

The Mental Health Act 1983 s 32 (as amended) (power of the Secretary of State to make regulations) (see PARA 442 post) applies for the purposes of s 117 (as amended) as it does for the purposes of Pt II (ss 2-34) (as amended): s 117(2B) (as so added).

As to the transfer of functions relating to supervised after-care from a health authority or local social services to another authority, person or body see PARA 414 note 9 ante.

12 Ibid s 117(2A)(b) (as added: see note 11 supra). See also note 11 supra.

UPDATE

428 Provision of after-care

TEXT AND NOTES--The Secretary of State may give financial assistance to qualifying bodies which are engaged in the provision of social care services which an English local authority must or may provide or arrange to be provided under the Mental Health Act 1983 s 117 or services which are similar to such services: see the Health and Social Care Act 2008 ss 149, 150, 156. Provision is made as to the forms in which such assistance may be given (Health and Social Care Act 2008 s 151), and the terms on which it may be given (s 152). The Secretary of State may direct certain specified NHS bodies to exercise any of his functions in relation to financial assistance under s 149 (s 153), may make arrangements for financial assistance to be given by another person or an English local authority (s 154), and may set up a company to fund qualifying bodies and people wanting to set up such bodies (s 155). In exercise of the power so conferred, the Secretary of State has made the Health and Social Care (Financial Assistance) Regulations 2009, SI 2009/649, which make provision for the conditions that must be met by qualifying bodies.

If regulations so provide, a primary care trust may, for the purpose of securing the provision for a patient of services that the trust must provide under the Mental Health Act 1983 s 117, make payments ('direct payments'), with the patient's consent, to the patient or to a person nominated by the patient: National Health Service Act 2006 s 12A(4), (5) (ss 12A-12D added by the Health Act 2009 s 11). A direct payment may be made only in accordance with a pilot scheme under regulations made by virtue of National Health Service Act 2006 s 12C: National Health Service Act 2006 ss 12A(6), 12C. As to regulations made under ss 12A, 12C, see the National Health Service (Direct Payments) Regulations 2010, SI 2010/1000. The Secretary of State may arrange with any person or body to give assistance in connection with direct payments: National Health Service Act 2006 s 12D.

NOTE 6--Mental Health Act 1983 s 117(2) further amended: Mental Health Act 2007 Sch 3 para 24.

TEXT AND NOTE 7--Reference to health authority is now to local health board (see PARA 526): Mental Health Act 1983 s 117(2A) (amended by SI 2007/961).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(5) SOCIAL SERVICES/429. Social circumstances reports.

429. Social circumstances reports.

Where a patient¹ is admitted to hospital² in pursuance of an application³ made under Part II of the Mental Health Act 1983⁴ by his nearest relative⁵, the managers⁶ of the hospital must as soon as practicable give notice of that fact to the local social services authority⁷ for the area in which the patient resided immediately before his admission; and that authority must arrange for a social worker to interview the patient and provide the managers with a report on his social circumstances⁸.

1 For the meaning of 'patient' see PARA 435 post.

2 For the meaning of 'hospital' see PARA 417 ante.

3 Ie except an emergency application: see PARA 462 post.

4 Ie the Mental Health Act 1983 Pt II (ss 2-34) (as amended).

5 For the meaning of 'nearest relative' see PARA 453 post.

6 For the meaning of 'managers' see PARA 439 post.

7 For the meaning of 'local social services authority' see PARA 424 ante.

8 Mental Health Act 1983 s 14 (amended by the Childrens Act 2004 s 65, Sch 5 Pt 4). This need not be done by an approved social worker (as to whom see PARA 427 ante).

UPDATE

429 Social circumstances reports

TEXT AND NOTE 8--Reference to a social worker now to an approved mental health professional: Mental Health Act 1983 s 14 (amended by Mental Health Act 2007 Sch 2 para 6).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(5) SOCIAL SERVICES/430. Visiting patients in hospital.

430. Visiting patients in hospital.

Where a local social services authority¹ is the guardian² or nearest relative³ of a mentally disordered person⁴, and that person is admitted to a hospital⁵, independent hospital⁶ or care home⁷ in England⁸ and Wales⁹, whether for treatment for mental disorder or otherwise, the authority is required to arrange for visits to be made to the patient¹⁰ and to take such steps as would be expected to be taken by his parents¹¹.

1 For the meaning of 'local social services authority' see PARA 424 ante.

2 See under the Mental Health Act 1983 (see PARAS 469-479, 502-503 post): Mental Health Act 1983 s 116(2) (b) (amended by the Mental Health (Scotland) Act 1984 s 127(1), Sch 3 para 55; and the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 16, Sch 3). The Mental Health Act 1983 s 116 (as amended) extends to Scotland: see s 146 (prospectively amended); and PARA 405 ante.

3 See where the functions of the nearest relative are for the time being transferred to the authority under the Mental Health Act 1983 (see PARA 456 post): s 116(2)(c) (amended by the Mental Health (Scotland) Act 1984 Sch 3 para 55; and the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 16, Sch 3). For the meaning of 'nearest relative' see PARA 453 post.

4 For the meaning of 'mentally disordered person' see PARA 402 ante. This duty also applies in respect of a mentally disordered child who is in the care of a local authority by virtue of a care order within the meaning of the Children Act 1989 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 271): see the Mental Health Act 1983 s 116(2)(a) (substituted by the Courts and Legal Services Act 1990 s 116, Sch 16 para 42).

5 For the meaning of 'hospital' see PARA 417 ante.

6 For the meaning of 'independent hospital' see PARA 421 note 5 ante.

7 An establishment is a 'care home' if it provides accommodation, together with nursing or personal care, for:

- 5 (1) persons who are or have been ill;
- 6 (2) persons who have or have had a mental disorder;
- 7 (3) persons who are disabled or infirm; or
- 8 (4) persons who are or have been dependent on alcohol or drugs,

but an establishment is not a care home if it is a hospital, an independent clinic, or a children's home, or if it is of a description excepted by regulations: see the Care Standards Act 2000 s 3; applied by the Mental Health Act 1983 s 145(1) (definition added by the Care Standards Act 2000 s 116, Sch 4 para 9(1), (10)(a)). As to the regulations that have been made see the Care Homes Regulations 2001, SI 2001/3965 (as amended); the Care Homes (Wales) Regulations 2002, SI 2002/324 (as amended); the Children Act 1989 and the Care Standards Act 2000 (Miscellaneous Regulations) (Amendment) (Wales) (No 2) Regulations 2002, SI 2002/2935; the Care Homes (Adult Placements) (Amendment) Regulations 2003, SI 2003/1845; and the Adult Placement Schemes (Wales) Regulations 2004, SI 2004/1756.

8 For the meaning of 'England' see PARA 405 note 6 ante.

9 For the meaning of 'Wales' see PARA 405 note 7 ante.

10 For the meaning of 'patient' see PARA 435 post.

11 Mental Health Act 1983 s 116(1) (amended by the Care Standards Act 2000 s 116, Sch 4 para 9(1), (5)). This provision extends to Scotland: see the Mental Health Act 1983 s 146; and PARA 405 ante.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(5) SOCIAL SERVICES/431. Prosecution of offences.

431. Prosecution of offences.

Local social services authorities¹ may institute proceedings for the following offences²:

- 1 (1) the forgery of or the making of false statements in applications, recommendations or other documents required or authorised for the purposes of the Mental Health Act 1983³;
- 2 (2) ill-treatment or wilful neglect of patients receiving treatment for mental disorder who are in-patients or out-patients, or who are subject to guardianship or otherwise in the custody or care of an individual, or who are subject to after-care under supervision⁴;
- 3 (3) assisting patients to absent themselves without leave or to escape⁵; and
- 4 (4) obstruction of authorised persons in the exercise of their functions under the Mental Health Act 1983⁶.

¹ For the meaning of 'local social services authority' see PARA 424 ante.

² A local social services authority may institute proceedings for any offence under the Mental Health Act 1959 Pt IX (ss 131-154) (as amended) or the Mental Health Act 1983 Pt IX (ss 126-130) (as amended), but without prejudice to any provision requiring the consent of the Director of Public Prosecutions for the institution of such proceedings: Mental Health Act 1959 s 131(1) (amended by the Local Government Act 1972 s 195(6), Sch 23 para 9(2)); Mental Health Act 1983 s 130. As to the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARAS 1066, 1079 et seq.

³ See *ibid* s 126 (as amended); and PARAS 765-766 post.

⁴ See *ibid* s 127 (as amended); and PARA 767 post.

⁵ See *ibid* s 128; and PARAS 770-771 post.

⁶ See *ibid* s 129 (as amended); and PARA 772 post.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(5) SOCIAL SERVICES/432. Registration of establishments and agencies under the Care Standards Act 2000.

432. Registration of establishments and agencies under the Care Standards Act 2000.

Any person carrying on or managing an establishment¹ or agency of any description without the necessary registration under Part II of the Care Standards Act 2000² is guilty of an offence³. The Act, amongst other things, makes provision for the registration and regulation of independent hospitals⁴ and care homes⁵.

There are provisions as to the supply of information relating to the establishment or agency and for the inspection of any relevant premises⁶. Regulations impose requirements in relation to the management of staff, the premises, and the conduct of establishments and agencies, and there is provision for the preparation of national minimum standards⁷.

1 For the meaning of 'registered establishment' see PARA 421 ante.

2 Ie the Care Standards Act 2000 Pt II (ss 11-42) (as amended; prospectively amended).

3 See *ibid* s 11 (amended by the Adoption and Children Act 2002 s 139(1), Sch 13 paras 103, 106; and the Health and Social Care (Community Health and Standards) Act 2003 s 147, Sch 9 paras 16, 20); and SOCIAL SERVICES AND COMMUNITY CARE.

4 For the meaning of 'independent hospital' see PARA 421 note 5 ante.

5 For the meaning of 'care home' see PARA 430 note 7 ante.

6 See the Care Standards Act 2000 ss 31-32 (amended and prospectively amended by the Adoption and Children Act 2002 Sch 13 paras 103, 111; and the Health and Social Care (Community Health and Standards) Act 2003 ss 108(1), (2), (3), (4), Sch 9 paras 16, 23, Sch 14 Pt 2); and SOCIAL SERVICES AND COMMUNITY CARE.

7 See the Care Standards Act 2000 ss 22-23 (amended by the Adoption and Children Act 2002 Sch 3 paras 103, 109, 110; and the Health and Social Care (Community Health and Standards) Act 2003 ss 105(1), (7), 107(2), Sch 9 paras 16, 21, Sch 14 Pt 2); and SOCIAL SERVICES AND COMMUNITY CARE. As to arrangements by a person carrying on or managing an independent hospital, independent clinic or independent medical agency for securing that any medical or psychiatric treatment are of appropriate quality and meet appropriate standards see the Care Standards Act 2000 s 22(7)(k).

UPDATE

432 Registration of establishments and agencies under the Care Standards Act 2000

NOTES 3, 6, 7--Care Standards Act 2000 ss 11, 22, 31 further amended: Education and Inspections Act 2006 Sch 14 paras 42, 46, 48.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(6) EDUCATION AND EMPLOYMENT SERVICES/433. Education, training and employment.

(6) EDUCATION AND EMPLOYMENT SERVICES

433. Education, training and employment.

Local education authorities¹ have a general duty to ensure that a child with special educational needs² who should be educated in a school is educated in a mainstream school³ if no statement of the child's special educational needs is maintained by the authority for the child⁴. If such a statement is maintained the child must be educated in a mainstream school unless that is incompatible with either the wishes of his parent or the provision of efficient education for other children⁵. An authority must have regard to guidance about these requirements⁶. In appropriate circumstances the local education authority may arrange for special educational provision to be made otherwise than in schools⁷. Relevant governing bodies and local education authorities also have duties in relation to special educational provision for pupils with special needs⁸.

Persons suffering from mental disorder may be disabled persons and as such are entitled to attend vocational training courses and industrial rehabilitation courses, to be registered as disabled persons, and to qualify for employment as such⁹.

1 As to local education authorities see the Education Act 1996 s 12; and EDUCATION vol 15(1) (2006 Reissue) PARA 20 et seq.

2 Ie who has a learning difficulty calling for special educational provision to be made for him: see ibid s 312 (as amended); and EDUCATION vol 15(2) (2006 Reissue) PARA 984.

3 Ie any school other than a special school or certain independent schools: see ibid s 316(4) (as amended); and EDUCATION vol 15(2) (2006 Reissue) PARA 1008.

4 See ibid s 316(2) (as substituted); and EDUCATION vol 15(2) (2006 Reissue) PARA 1008. The statement must be in such a form and contain such information as may be prescribed; and it must give details of the authority's assessment of the child's special educational needs and specify the special educational provision to be made to meet the needs: see s 324 (as amended); and EDUCATION vol 15(2) (2006 Reissue) PARA 996.

5 See ibid s 316(3) (as substituted); and EDUCATION vol 15(2) (2006 Reissue) PARA 1008. As to permissible education other than in mainstream schools including education in certain independent schools and approved special schools if the cost is met otherwise than by a local education authority see s 316A (as added and amended) ; and EDUCATION vol 15(2) (2006 Reissue) PARA 1008.

6 Ie the requirements of ibid s 316 (as substituted and amended) and s 316A (as added and amended).

7 See ibid s 319; and EDUCATION vol 15(2) (2006 Reissue) PARA 1011. There is also provision for education outside England and Wales for certain children: see s 320; and EDUCATION vol 15(2) (2006 Reissue) PARA 1012.

8 See ibid s 318 (as amended); and EDUCATION vol 15(2) (2006 Reissue) PARA 1011.

9 See the Disabled Persons (Employment) Act 1944; the Disabled Persons (Employment) Act 1958; and EMPLOYMENT.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/2. MENTAL HEALTH SERVICES/(7) INQUIRIES/434. Inquiries and investigations.

(7) INQUIRIES

434. Inquiries and investigations.

In addition to statutory inquiries¹, non-statutory independent investigations may be held in the area of mental health practice².

The relevant strategic health authority³ determines whether such an investigation is necessary, appoints the investigation team, agrees terms of reference, publishes and distributes the resultant report, and ensures that there is a process for subsequent action to address issues raised⁴. The National Patient Safety Agency⁵ may also play a role in independent investigations.

Generally an independent investigation is undertaken: (1) when a homicide has been committed by a person who is or has been under the care of special mental health services six months prior to the event; (2) whenever a state agent is or may be responsible for a death; and (3) where the strategic health agency determines that an adverse event warrants such an investigation⁶.

1 Eg in accordance with the Inquiries Act 2005. Under s 1 there is a general power for a minister to cause an inquiry to be held in relation to a case where it appears to him that particular events have caused or are capable of causing public concern or there is public concern that particular events have occurred. See ADMINISTRATIVE LAW.

2 See in particular Department of Health guidance HSG (94) 27 paras 33-36 (substituted by Independent investigation of adverse events in mental health services) (June 2005)).

3 For the meaning of 'strategic health authority' see PARA 439 note 6 post.

4 See note 2 supra.

5 The National Patient Safety Agency is a special health authority, whose remit includes responsibility for patient safety. In particular, it aims to help the health services to learn from incidents so as to prevent harm in the future.

6 See note 2 supra.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(1) IN GENERAL/435. Meaning of 'patient' generally.

3. CARE AND TREATMENT OF PATIENTS

(1) IN GENERAL

435. Meaning of 'patient' generally.

In the Mental Health Act 1983, except in relation to the management of the property and affairs of patients¹ and unless the context otherwise requires², 'patient' means a person suffering, or appearing to be suffering, from mental disorder³.

1 le except in the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed) (see PARA 671 et seq post). For the special meaning of 'patient' for the purposes of Pt VII (as amended; prospectively amended and repealed) see PARA 681 post. See note 3 infra.

2 A restricted patient who is conditionally discharged from hospital, because a mental health review tribunal is satisfied that he is not suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment (see PARA 570 post), remains a 'patient' until discharged absolutely: *R v Merseyside Mental Health Review Tribunal, ex p K* [1990] 1 All ER 694, CA. For the meaning of 'restricted patient' see PARA 564 note 58 post.

3 Mental Health Act 1983 s 145(1). For the meaning of 'mental disorder' see PARA 402 ante.

As from a day to be appointed, the definition of 'patient' is amended so as to omit the exception in regard to Pt VII (as amended; prospectively amended and repealed) (see the text and note 1 supra): s 145(1) (prospectively amended by the Mental Capacity Act 2005 s 67, Sch 6 para 29(1), (7), Sch 7). At the date at which this volume states the law no such day had been appointed. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

References in the Mental Health Act 1983 to a patient being subject to after-care under supervision (or to after-care under supervision) must be construed in accordance with the provisions relating to supervision applications: see s 145(1A) (as added); and PARA 528 post. As to supervision applications see s 25A (as added and amended); and PARA 528 post.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(1) IN GENERAL/436. Care and treatment of patients generally.

436. Care and treatment of patients generally.

The law governing the care and medical treatment¹ of mentally disordered patients is mainly contained in the Mental Health Act 1983. In-patient medical treatment may be provided either in hospitals² or in registered establishments³. Care, but not in-patient medical treatment, may be provided in registered establishments or in accommodation provided by local social services authorities⁵ for old or disabled people⁶ or for the prevention of illness or for care and after-care⁷.

Patients may be admitted to hospitals and registered establishments either as informal patients⁸ or compulsorily⁹. Patients who do not require care and treatment in hospital but who do require other forms of care under compulsory powers, either in the interests of their own welfare or for the protection of other persons, may be placed under the guardianship of the local social services authority or any other person willing to act as guardian¹⁰. Patients compulsorily admitted to hospital or received into guardianship may apply or be referred to a mental health review tribunal¹¹.

Where a person has been detained under the Mental Health Act 1983 there is an implied power for staff to exercise a degree of control over their activities; the common law doctrine of necessity also allows staff to act in such a way as is reasonable, necessary and proportionate to protect the patient from the immediate risk of significant harm¹².

The Secretary of State¹³ must prepare, and from time to time revise, a code of practice for: (1) the guidance of registered medical practitioners, managers and staff of hospitals, independent hospitals and care homes and approved social workers in relation to the admission of patients to hospitals and registered establishments and to guardianship and after-care under supervision; and (2) the guidance of registered medical practitioners and members of other professions in relation to the medical treatment of patients suffering from mental disorder¹⁴. The guidance in the code¹⁵ that has been issued is intended primarily to accommodate the needs, rights and entitlements of mentally disordered persons who are detained under the relevant mental health legislation, although much of it is equally applicable to informal patients¹⁶. The Mental Health Act 1983 does not impose a legal duty to comply with the code but failure to follow it could be referred to in evidence in legal proceedings¹⁷.

1 As to the meaning of 'medical treatment' see PARA 552 post.

Seclusion of a patient as a means of lawful medical treatment, if proportionate, will not automatically infringe a patient's rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969): see *R (on the application of Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, [2005] All ER (D) 139 (Oct). As to the Convention see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

2 For the meaning of 'hospital' see PARA 417 ante.

3 As to registered establishments see PARAS 421, 432; and SOCIAL SERVICES AND COMMUNITY CARE.

5 As to local social services authorities see PARA 424 ante.

6 Ie under the National Assistance Act 1948 Pt III (ss 21-35) (as amended): see PARAS 424-425 ante; and SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1005 et seq.

7 Ie under the National Health Service Act 1977 s 21(1)(b), Sch 8 para 2 (as amended): see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1026. Note that there is no longer any power under this provision to provide residential accommodation.

- 8 As to the informal admission of patients see PARA 437 post.
- 9 As to the compulsory admission of patients see PARA 460 et seq post.
- 10 As to reception into guardianship see PARA 469 et seq post.
- 11 See the Mental Health Act 1983 ss 66, 67 (as amended); and PARA 564 et seq post.
- 12 *R (on the application of Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, [2005] All ER (D) 139 (Oct). This applies regardless of the patient's capacity and enables staff to restrain a person with no more force than is reasonably necessary and thereafter to seclude them: see also note 1 supra. As to the common law powers of private individuals to restrain a person of unsound mind see *B v Forsey* 1988 SLT 572, HL. See also PARA 1407 note 1 ante.
- 13 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.
- 14 Mental Health Act 1983 s 118(1), (6) (s 118(1) amended by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 16; and the Care Standards Act 2000 s 116, Sch 4 para 9(1), (6)). Before preparing the code or making any alterations to it the Secretary of State must consult such bodies as appear to him to be concerned: Mental Health Act 1983 s 118(3). The code must be published and copies laid before both Houses of Parliament: s 118(4), (5). The function of preparing and revising the code has been delegated to the central policy committee of the Mental Health Act Commission: see the Mental Health Act Commission (Establishment and Constitution) Order 1983, SI 1983/892, art 3(2)(d); and the Mental Health Act Commission Regulations 1983, SI 1983/894, reg 7(2)(a). As to the importance of the code see *R (on the application of Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, [2005] All ER (D) 139 (Oct) (it was held that the code has less binding effect than a statutory provision but is more than mere advice; there should only be departure from the code where there are cogent reasons for doing so). As to the code of practice under the Mental Capacity Act 2005 see PARAS 645-646 post. As to the constitution and functions of the Mental Health Act Commission see PARA 413 ante.
- 15 Ie the Department of Health and Welsh Office, Code of Practice--Mental Health Act 1983; published March 1999 pursuant to the Mental Health Act 1983 s 118 (as amended), and referred to as the Code of Practice (1999).
- 16 See the Department of Health and Welsh Office, Circular EL (90) P/85, LASSL (90) 5, WHC (90) 38 (May 1990) PARA 4.
- 17 See Code of Practice (1999) PARA 1. As to the status of the code see *R (on the application of Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, [2005] All ER (D) 139 (Oct); and note 14 supra.

UPDATE

436 Care and treatment of patients generally

TEXT AND NOTES--The Secretary of State and the Welsh Ministers may make such arrangements as they consider reasonable to enable independent mental health advocates to be available to help qualifying patients, as defined by s 130C: Mental Health Act 1983 s 130A (ss 130A-130D added by Mental Health Act 2007 s 30(2)). See Mental Health Act 1983 (Independent Mental Health Advocates) (England) Regulations 2008, SI 2008/3166 (amended by SI 2009/2376, and virtue of SI 2009/278); Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2008, SI 2008/2437. As to the help available to such patients under such arrangements see the Mental Health Act 1983 s 130B. The responsible person in relation to a qualifying patient has a duty to ensure that the patient understands that help is available to him from an independent mental health advocate; and how he can obtain that help: s 130D.

TEXT AND NOTE 14--Head (1). The code is also to be for the guidance of approved clinicians, the reference to approved social workers is now to approved mental health professionals, and the reference to after-care under supervision is now to community patients: Mental Health Act 1983 s 118(1) (amended by Mental Health Act 2007 s 14(2), Sch 2 para 9, Sch 3 para 25). The code must include a statement of the principles which should inform decisions under the Mental Health Act 1983, must

address prescribed matters and have regard to the desirability of ensuring the efficient use of resources and the equitable distribution of services: see s 118(2A)-(2C) (s 118(2A)-(2D) added by Mental Health Act 2007 s 8). In performing functions under the Mental Health Act 1983, the persons mentioned in heads (1) and (2) have a duty to have regard to the code: s 118(2D).

NOTE 14--SI 1983/892, SI 1983/894 revoked: Health and Social Care Act 2008 Sch 15 Pt 1. Functions of the Mental Health Act Commission under the Mental Health Act 1983 transferred, in relation to England, to the Care Quality Commission (see PARA 413), and, in relation to Wales, to the Welsh Ministers: Health and Social Care Act 2008 s 52(3).

NOTES 1, 12, 14, 17--*Munjaz*, cited, reported at [2006] 2 AC 148.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(1) IN GENERAL/437. Informal admission of patients.

437. Informal admission of patients.

Nothing in the Mental Health Act 1983 is to be construed as preventing a patient who requires treatment for mental disorder from being admitted to any hospital¹ or registered establishment² in pursuance of arrangements made in that behalf and without any application³, order⁴ or direction⁵ rendering him liable to be detained under that Act, or from remaining in any hospital or registered establishment in pursuance of such arrangements after he has ceased⁶ to be so liable to be detained⁷. In the case of a minor who has attained the age of 16⁸ and is capable of expressing his own wishes, any such arrangements may be made, carried out and determined even though there are one or more persons who have parental responsibility⁹ for him¹⁰.

There is no authority to detain a patient admitted informally should he insist on leaving¹¹, unless the medical practitioner in charge of his treatment has reported that an application ought to be made for his compulsory admission to hospital or, if that is not practicable, a nurse has reported that it is necessary for him to be immediately restrained from leaving the hospital¹².

1 For the meaning of 'hospital' see PARA 417 ante.

2 For the meaning of 'registered establishment' see PARA 421 ante. See also PARA 432 ante.

3 I.e. an application for admission for assessment or for treatment: see the Mental Health Act 1983 ss 2-4; and PARAS 460-462 post.

4 I.e. a hospital order made by a court for the admission and detention of an offender in hospital: see *ibid* s 37 (as amended); and PARA 491 post.

5 I.e. a transfer direction made by the Secretary of State for the removal of a prisoner to a specified hospital for treatment for mental disorder: see *ibid* ss 47(1), 48 (as amended); and PARAS 535-537 post.

6 As to the duration of authority to detain patients admitted for treatment see PARAS 518-522 post.

7 Mental Health Act 1983 s 131(1) (amended by the Care Standards Act 2000 s 116, Sch 4 paras 9(1), (2)).

The Mental Health Act 1983 s 131 (as amended) allows the informal detention of patients who are not capable of consenting to detention: see *R v Bournemouth Community and Mental Health NHS Trust, ex p L* [1999] 1 AC 458, [1998] 3 All ER 289, HL. For proceedings under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969), where the applicant's detention was found to be in breach of art 5 (and without sufficient procedural safeguards as to meet art 5(4) in regard to review of the detention), see *HL v United Kingdom (Application 45508/99)* (2004) 81 BMLR 131, (2004) Times, 19 October, ECtHR; and see also *Kolanis v United Kingdom (Application 517/02)* [2005] All ER (D) 227 (Jun), ECtHR. As to the European Convention on Human Rights and Fundamental Freedoms art 5 see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 127 et seq. The Mental Capacity Act 2005 ss 35-41 (see PARA 663 et seq post) create a new scheme designed to provide for the input of an independent consultee where certain decisions need to be taken for particularly vulnerable people who lack capacity, the apparent intention being to address concerns raised in *R v Bournemouth Community and Mental Health NHS Trust, ex p L* supra and *HL v United Kingdom (Application 45508/99)* supra. At the date at which this volume states the law it is anticipated that the legislation may be amended so as to provide further safeguards for incapacitated patients effectively deprived of their liberty but treated as informal patients to whom the safeguards provided by the Mental Health Act 1983 do not apply. See *Bournemouth - Interim Advice* (10 December 2004). See also the Mental Capacity Act 2005 ss 5, 6; and PARA 644 post. At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

8 A person attains the age expressed in years at the commencement of the relevant anniversary of the date of his birth: Family Law Reform Act 1969 s 9(1). As to the power to make regulations relating to the determination of age see the Mental Health Act 1983 s 32(1), (2)(d). Provision was formerly made by the Mental

Health (Hospital and Guardianship) Regulations 1960, SI 1960/1241, reg 26, but the regulations were revoked without replacement of this provision by the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 20, Sch 2.

9 For the meaning of 'parental responsibility' see the Children Act 1989 s 3; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 134 et seq.

10 Mental Health Act 1983 s 131(2) (amended by the Children Act 1989 s 108(5), Sch 13 para 48(5)). A parent or other person with parental responsibility may consent to treatment on behalf of a minor who does not have the capacity to do so for himself (see eg *R v Kirklees Metropolitan Borough Council, ex p C* [1992] 2 FCR 321, [1992] 2 FLR 117); but a minor below the age of 16 who has sufficient capacity may consent to treatment on his own behalf, irrespective of parental wishes (*Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, [1985] 3 All ER 402, HL). It is submitted that these principles apply equally to informal admission to hospital. Quære whether if a minor of any age has sufficient capacity and does not consent, a parent or other person with parental responsibility can nevertheless consent on his behalf: see *Re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11 at 24-25, [1991] 4 All ER 177 at 186-187, CA, per Lord Donaldson of Lymington MR. The court, in the exercise of its inherent jurisdiction, may certainly do so: *Re J (A Minor) (Inherent Jurisdiction: Consent to Treatment)* (1992) Times, 15 July, CA. See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 4. Guidance on the care and treatment of children and young persons under the age of 18 is given in the Code of Practice (1999) PARAS 31.1-31.24. As to the Code of Practice see PARA 436 ante.

A locked unit in a psychiatric hospital can be 'accommodation which is provided for the purpose of restricting the liberty' of children to whom the Children Act 1989 s 25 (as amended) (use of accommodation for restricting liberty) applies: *R v Northampton Juvenile Court, ex p Hammersmith and Fulham London Borough Council* [1985] FLR 193. The Children Act 1989 s 25 (as amended) does not, however, apply to a child who is detained under any provision of the Mental Health Act 1983 or in respect of whom an order has been made under the Powers of the Criminal Courts (Sentencing) Act 2000 s 90 or s 91 (detention at Her Majesty's pleasure or for a specified period) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 81); Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 5 (amended by SI 2002/546; SI 2002/2935). See further CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1045.

There is no age below which applications for compulsory admission to hospital under the Mental Health Act 1983 (see PARAS 460-463 post) cannot be made.

11 The Code of Practice (1999) PARA 1.11 states that it should be made clear to informal patients that they are free to leave hospital at any time. See also Code of Practice (1999) PARA 9.1. See note 7 supra.

12 See PARA 463 post.

UPDATE

437 Informal admission of patients

NOTE 8--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

TEXT AND NOTE 10--The Mental Health Act 1983 s 131(3), (4) applies in the case of a patient aged 16 or 17 years who has capacity to consent to the making of such arrangements as are mentioned in s 131(1): s 131(2) (s 131(2)-(5) substituted by Mental Health Act 2007 s 43). In the Mental Health Act 1983 s 131 the reference to a patient who has capacity is to be read in accordance with the Mental Capacity Act 2005: Mental Health Act 1983 s 131(5)(a). If the patient consents to the making of the arrangements, they may be made, carried out and determined on the basis of that consent even though there are one or more persons who have parental responsibility for him: s 131(3). In s 131 'parental responsibility' has the same meaning as in the Children Act 1989: Mental Health Act 1983 s 131(5)(b). If the patient does not consent to the making of the arrangements, they may not be made, carried out or determined on the basis of the consent of a person who has parental responsibility for him: s 131(4).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(1) IN GENERAL/438. General protection of informal patients.

438. General protection of informal patients.

At the request of, or after consultation with, the Mental Health Act Commission¹ and after consulting such other bodies as appear to him to be concerned, the Secretary of State² may direct the Commission to keep under review the care and treatment, or any aspect of it, in hospitals³, independent hospitals⁴ and care homes⁵, of patients⁶ who are not liable to be detained⁷. For the purposes of such review, an authorised person⁸ may at any reasonable time visit and interview, and if he is a medical practitioner examine, in private any patient in an independent hospital or a care home and require the production of, and inspect, any records relating to the patient's treatment there⁹.

1 As to the constitution and functions of the Mental Health Act Commission see PARA 413 ante.

2 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

3 For the meaning of 'hospital' see PARA 417 ante.

4 For the meaning of 'independent hospital' see PARA 421 note 5 ante.

5 For the meaning of 'care home' see PARA 430 note 7 ante.

6 For the meaning of 'patient' see PARA 435 ante.

7 Mental Health Act 1983 s 121(4) (amended by the Care Standards Act 2000 s 116, Sch 4 para 9(1), (7)(a)). This provision does not extend to mentally disordered persons living outside hospitals, independent hospitals or care homes. At the date at which this volume states the law no such direction had been given.

8 In any person authorised for these purposes. The Secretary of State may make provision as to the remuneration, allowances, pensions or gratuities of any such person: Mental Health Act 1983 s 121(6).

9 Ibid s 121(5) (amended by the Care Standards Act 2000 Sch 4 para 9(1), (7)(b)).

UPDATE

438 General protection of informal patients

TEXT AND NOTES--Repealed: Health and Social Care Act 2008 s 52(4), Sch 15 Pt 1.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(1) IN GENERAL/439. Managers of hospitals and registered establishments.

439. Managers of hospitals and registered establishments.

Hospitals¹ and registered establishments² are administered by the managers³. 'The managers' means: (1) in relation to a hospital vested in the Secretary of State⁴ for the purposes of his functions under the National Health Service Act 1977 and in relation to any accommodation provided by a local authority and used as a hospital by or on behalf of the Secretary of State under that Act, the primary care trust⁵, strategic health authority⁶, health authority⁷ or special health authority⁸ responsible for the administration of the hospital; (2) in relation to a hospital vested in a primary care trust or NHS trust⁹, the trust; (3) in relation to a hospital vested in an NHS foundation trust¹⁰, the trust; and (4) in relation to a registered establishment, the person or persons registered in respect of the establishment¹¹.

1 For the meaning of 'hospital' see PARA 417 ante.

2 For the meaning of 'registered establishment' see PARA 421 ante. See also PARA 432 ante.

3 The functions of managers under the Mental Health Act 1983 include: receiving and deciding upon applications for admission to hospital under Pt II (ss 2-34) (as amended) (see s 11(2); and PARAS 480-481 post); providing evidence that arrangements have been made for admission to that hospital before a court can remand a patient to hospital for reports (see s 35(4); and PARA 489 post) or for treatment (see s 36(3); and PARA 489 post) or make a hospital order (see s 37(4) (as amended); and PARAS 491, 495 post) or interim hospital order (see s 38(4); and PARAS 491, 495 post); detaining patients pursuant to such applications (see s 6(2); and PARA 464 post), remands (see ss 35(9)(b), 36(8); and PARA 489 post), and orders (see s 40(1), (3); and PARA 494 post); receiving reports from the doctor in charge of the patient's treatment, or from a nurse, that an informal in-patient ought to be kept in hospital (see s 5(2), (4), (5); and PARA 463 post); receiving reports from medical officers relating to the reclassification of patients (see s 16(1); and PARA 527 post), or to renewal of the authority to detain (see s 20(3); and PARA 520 post), or preventing discharge by the nearest relative (see s 25(1); and PARA 525 post); discharging patients (see s 23(2)(a); and PARA 523 post); referring certain patients to mental health review tribunals (see s 68(1); and PARA 514 post); informing the local social services authority of an admission on the application of the patient's nearest relative (see s 14; and PARA 425 ante); informing the nearest relative if a detained patient is reclassified (see s 16(4); and PARA 527 post) or discharged (see s 133 (as amended); and PARA 523 post) or if the relative is prevented from discharging him (see s 25(2); and PARA 525 post); informing the patient if he is reclassified (see s 16(4); and PARA 527 post) or if his detention is renewed (see s 20(3); and PARA 536 post); generally giving information to detained patients and their nearest relatives (see s 132; and PARA 440 post); and censoring certain patients' correspondence (see s 134; and PARA 443 post). Where a patient has been admitted to a hospital pursuant to an application under s 2, 3 or 4 or detained pursuant to a report under s 5(2), a record of admission must be made by the managers of the hospital and attached to the application or report: Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 4(3), Sch 1 Form 14 (substituted by SI 1996/540). Where the managers of a hospital are required under the regulations to make any record or report, that function may be performed by an officer authorised in that behalf by the managers: Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 3(6). As to the power of the Secretary of State to make regulations determining the manner in which, inter alia, the managers' functions are to be exercised see PARA 442 post. Managers are public authorities for the purposes of the Human Rights Act 1998 s 6 (prospectively amended): *R (on the application of A) v Partnerships in Care Ltd* [2002] EWHC 529 (Admin), [2002] 1 WLR 2611.

For guidance on the duties of the hospital managers see Code of Practice (1999) PARAS 22.1-22.18. Generally it is the hospital managers who have the power to detain patients who have been admitted under the Mental Health Act 1983: see Code of Practice (1999) PARA 22.2. As to the Code of Practice see PARA 436 ante.

4 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

5 For the meaning of 'primary care trust' see PARA 414 note 6 ante.

6 'Strategic health authority' means a strategic health authority established under the National Health Service Act 1977 s 8 (as substituted) (see HEALTH SERVICES vol 54 (2008) PARA 94); Mental Health Act 1983 s 145(1) (definition added by the National Health Service Reform and Health Care Professions Act 2002

(Supplementary, Consequential etc Provisions) Regulations 2002, SI 2002/2469, reg 4, Sch 1 Pt 1 para 10(1), (4) (b)).

7 For the meaning of 'health authority' see PARA 414 note 6 ante.

8 For the meaning of 'special health authority' see PARA 410 note 10 ante.

9 As to NHS trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq.

10 As to NHS foundation trusts see HEALTH SERVICES vol 54 (2008) PARA 174 et seq.

11 Mental Health Act 1983 s 145(1) (definition amended by the National Health Service and Community Care Act 1990 s 66(1), Sch 9 para 24(9); the Mental Health (Amendment) Act 1994 s 1; the Health Authorities Act 1995 s 2(1), Sch 1 para 107(14); the Health Act 1999 ss 41(2), 65, Sch 5; the Care Standards Act 2000 s 116, Sch 4 para 9(1), (10)(c); the National Health Service Reform and Health Care Professions Act 2002 s 2(5), Sch 2 Pt 2 paras 42, 49; the Health and Social Care (Community Health and Standards) Act 2003 s 34, Sch 4 paras 50, 57; the Health Act 1999 (Supplementary, Consequential etc Provisions) Regulations 2000, SI 2000/90, art 3(1), Sch 1 para 16; and the National Health Service Reform and Health Care Professions Act 2002 (Supplementary, Consequential etc Provisions) Regulations 2002, SI 2002/2469, reg 4, Sch 1 Pt 1 para 10(1), (4)(a)).

UPDATE

439 Managers of hospitals and registered establishments

NOTE 3--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

TEXT AND NOTE 6--Definition of 'strategic health authority' amended: 1983 Act s 145(1) (amended by National Health Service (Consequential Provisions) Act 2006 Sch 1 para 70(g)).

TEXT AND NOTE 10--See 1983 Act s 142B (added by Mental Health Act 2007 s 45(3)) (delegation of powers of managers of NHS foundation trusts).

TEXT AND NOTE 11--Definition of 'the managers' in 1983 Act s 145(1) further amended: 2006 Act Sch 1 para 70(d); 2007 Act s 46(3)(b); SI 2007/961.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(1) IN GENERAL/440. Duty of managers to give detailed information to detained patients.

440. Duty of managers to give detailed information to detained patients.

The managers¹ of a hospital² or registered establishment³ in which a patient⁴ is detained must, as soon as practicable after the commencement of the patient's detention, take such steps as are practicable to ensure that the patient understands: (1) under which of the statutory provisions he is being detained and its effect⁵; (2) his right of application to a mental health review tribunal⁶; (3) his right to be discharged⁷, to receive and send correspondence⁸, and to consent to or refuse treatment⁹; (3) the effect of the Code of Practice¹⁰; and (4) the protective functions of the Mental Health Act Commission¹¹. This information must be given orally and in writing¹². In addition the managers must take such steps as are practicable to inform in writing the patient's nearest relative¹³, if any, of the above¹⁴.

1 For the meaning of 'managers' see PARA 439 ante.

2 For the meaning of 'hospital' see PARA 417 ante.

3 For the meaning of 'registered establishment' see PARA 421 ante. See also PARA 432 ante.

4 For the meaning of 'patient' see PARA 435 ante.

5 Mental Health Act 1983 s 132(1)(a) (s 132(1), (2), (4) amended by the Care Standards Act 2000 s 116, Sch 4 paras 9(1), (2)). The Code of Practice (1999) PARAS 14.1-14.5 gives guidance about the information to be given to detained patients, those subject to guardianship and nearest relatives. As to the Code of Practice see PARA 436 ante.

6 Mental Health Act 1983 s 132(1)(b). As to those rights see PARA 564 post.

7 Ie under ibid ss 23, 25 (as amended). As to discharge see PARA 523 et seq post.

8 Ie under ibid s 134 (as amended). As to that right see PARA 443 post.

9 Ie under ibid ss 56-64 (as amended). As to consent to treatment see PARA 551 et seq post.

10 Ibid s 132(2) (as amended: see note 5 supra). See PARA 436 ante.

11 Ie under ibid s 120 (as amended): see PARA 441 post. As to the constitution and functions of the Mental Health Act Commission see PARA 413 ante.

12 Ibid s 132(3).

13 For the meaning of 'nearest relative' see PARA 453 post. This includes a person acting as the nearest relative: see PARA 456 post.

14 Mental Health Act 1983 s 132(4) (as amended: see note 5 supra).

UPDATE

440 Duty of managers to give detailed information to detained patients

TEXT AND NOTES--The manager of the responsible hospital has a similar duty to give information to a community patient: see Mental Health Act 1983 s 132A (added by Mental Health Act 2007 Sch 3 para 30).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(1) IN GENERAL/441. General protection of detained patients.

441. General protection of detained patients.

The Mental Health Act Commission¹ must keep under review the exercise of powers and the discharge of duties conferred or imposed relating to the detention of patients² or to patients liable to be detained³. Arrangements must be made for authorised persons⁴ to visit and interview, in private, patients detained in hospitals and registered establishments⁵ and to investigate certain complaints⁶. To this end an authorised person may at any reasonable time visit and interview, and if he is a medical practitioner examine in private, any patient in a registered establishment; and he may require the production of, and inspect, any records relating to the detention or treatment of any person detained or who has been detained in a registered establishment⁷.

1 As to the constitution and functions of the Mental Health Act Commission see PARA 413 ante.

2 For the meaning of 'patient' see PARA 435 ante.

3 See the Mental Health Act 1983 ss 120(1), 121(2)(b); Mental Health Act Commission (Establishment and Constitution) Order 1983, SI 1983/892 (amended by SI 1998/1577).

4 He authorised by the Secretary of State, who may provide, with Treasury approval, for remuneration, allowances, pensions and gratuities to people exercising functions under this provision: Mental Health Act 1983 s 120(6). As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante. As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.

5 Ibid s 120(1)(a) (s 120(1), (4) amended by the Care Standards Act 2000 s 116, Sch 4 para 9(1), (2)). For the meaning of 'registered establishment' see PARA 421 ante. See also PARA 432 ante.

6 See the Mental Health Act 1983 s 120(1)(b) (as amended: see note 5 supra). The complaints that may be investigated are: (1) any complaint made by a person in respect of a matter that occurred while he was detained in a hospital or registered establishment and which he considers has not been satisfactorily dealt with by the managers of that hospital or registered establishment; and (2) any other complaint as to the exercise of the powers or the discharge of the duties conferred or imposed in respect of a person who is or has been detained: see s 120(1)(b) (as so amended). If a complaint under head (2) supra is made by a member of Parliament, the results of any investigation must be reported to that member: s 120(3).

Arrangements under s 120 (as amended) may exclude matters from investigation in specified circumstances; there is no requirement to undertake or continue any investigation where the person carrying it out considers that it is inappropriate to do so: s 120(2).

As to the scope of the Commission's jurisdiction to hear complaints see *R v Mental Health Act Commission, ex p Smith* (1998) 43 BMLR 174 (jurisdiction to entertain complaint of inappropriate detention in secure unit, and of inadequate care and assessment).

7 Mental Health Act 1983 s 120(4) (as amended: see note 5 supra). Regulations may be made as to the keeping of records and of other matters relating to registered establishments: see the Care Standards Act 2000 ss 22-24, 33-35 (as amended; prospectively amended); and SOCIAL SERVICES AND COMMUNITY CARE.

UPDATE

441 General protection of [relevant] patients

TEXT AND NOTES--Replaced. The regulatory authority must keep under review and, where appropriate, investigate the exercise of the powers and the discharge of the duties conferred or imposed by the Mental Health Act 1983 so far as relating to the detention of patients or their reception into guardianship or to relevant patients: s 120(1) (s 120

substituted by Health and Social Care Act 2008 Sch 3 para 8). 'The regulatory authority' means, in relation to England, the Care Quality Commission (see PARA 413), and, in relation to Wales, the Welsh Ministers: Mental Health Act 1983 s 145 (definition added by Health and Social Care Act 2008 Sch 3 para 13). Relevant patients are patients liable to be detained under the Mental Health Act 1983, community patients, and patients subject to guardianship: s 120(2). The regulatory authority must make arrangements for persons authorised by it to visit and interview relevant patients in private, in the case of relevant patients detained under the Mental Health Act 1983, in the place where they are detained, and, in the case of other relevant patients, in hospitals and regulated establishments and, if access is granted, other places: s 120(3). The regulatory authority must also make arrangements for persons authorised by it to investigate any complaint as to the exercise of the powers or the discharge of the duties conferred or imposed by the Mental Health Act 1983 in respect of a patient who is or has been detained under the Mental Health Act 1983 or who is or has been a relevant patient: s 120(4). The arrangements made under s 120(4) may exclude matters from investigation in specified circumstances, and do not require any person exercising functions under the arrangements to undertake or continue with any investigation where the person does not consider it appropriate to do so: s 120(5). Where any such complaint as is mentioned in s 120(4) is made by a Member of Parliament or a member of the National Assembly for Wales, the results of the investigation must be reported to the Member of Parliament or member of the Assembly: s 120(6). For the purposes of a review or investigation under s 120(1) or the exercise of functions under arrangements made under this provision, a person authorised by the regulatory authority may at any reasonable time (1) visit and interview in private any patient in a hospital or regulated establishment; (2) if the authorised person is a registered medical practitioner or approved clinician, examine the patient in private there; and (3) require the production of and inspect any records relating to the detention or treatment of any person who is or has been detained under the Mental Health Act 1983 or who is or has been a community patient or a patient subject to guardianship: s 120(7). The regulatory authority may make provision for the payment of remuneration, allowances, pensions or gratuities to or in respect of persons exercising functions in relation to any review or investigation for which it is responsible under s 120(1) or functions under arrangements made by it under this provision: s 120(8). For these purposes 'regulated establishment' means an establishment in respect of which a person is registered under the Care Standards Act 2000 Pt II (ss 11-42), or premises used for the carrying on of a regulated activity (within the meaning of the Health and Social Care Act 2008 Pt 1 (ss 1-97)) (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1001A.1) in respect of which a person is registered under Pt 2 Ch 2 (ss 8-44): Mental Health Act 1983 s 120(9).

The regulatory authority may publish a report of a review or investigation carried out by it under s 120(1), and the Secretary of State and the Welsh Ministers may make regulations about the making of representations before the publication of such a report: s 120A (ss 120A-120D added by Health and Social Care Act 2008 Sch 3 para 9). The regulatory authority may require hospital managers, social services departments and other prescribed people to publish a statement of the action they propose to take in response to any recommendations following a review or investigation undertaken under the Mental Health Act 1983 s 120(1): s 120B. Hospital managers, local social services authorities and other prescribed people must provide the regulatory authority with information, including records and documents, that the authority may require in relation to its functions under s 120: s 120C. The regulatory authority must publish an annual report on its activities in the exercise of its functions under the Mental Health Act 1983: s 120D.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(1) IN GENERAL/442. Regulations for compulsory admission, reception and removal.

442. Regulations for compulsory admission, reception and removal.

The Secretary of State¹ has power to make regulations² prescribing matters which, under the statutory provisions for compulsory admission to hospital and reception into guardianship³ and those applying to patients removed to England⁴ and Wales⁵ from other parts of the United Kingdom⁶, the Channel Islands or the Isle of Man⁷, are required or authorised to be prescribed, and otherwise for carrying those provisions into effect⁸. The Secretary of State may⁹ also make regulations prescribing the manner in which the functions of hospital managers¹⁰, local social services authorities¹¹, health authorities¹², special health authorities¹³, primary care trusts¹⁴, NHS trusts or NHS foundation trusts¹⁵ are to be exercised¹⁶.

1 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

2 See the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893 (amended by SI 1993/2156; SI 1996/540; SI 1997/801; SI 1998/2624; SI 2002/2469).

3 I.e. the Mental Health Act 1983 Pt II (ss 2-34) (as amended): see PARA 460 et seq post.

4 For the meaning of 'England' see PARA 405 note 6 ante.

5 For the meaning of 'Wales' see PARA 405 note 7 ante.

6 For the meaning of 'United Kingdom' see PARA 406 note 18 ante.

7 I.e. the Mental Health Act 1983 Pt VI (ss 80-92) (as amended). See also the Mental Health (Care and Treatment) (Scotland) Act 2003; and the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9).

8 See the Mental Health Act 1983 s 32(1). The regulations may, in particular, make provision for: (1) prescribing the form of any application, recommendation, report, order, notice or other document to be made or given; (2) prescribing the manner in which such documents may be proved and served; (3) requiring such bodies as may be prescribed by the regulations to keep such registers or other records as may be so prescribed in respect of patients liable to be detained or subject to guardianship or to after-care under supervision under Pt II (as amended) and to furnish or make available to those patients, and their relatives, such written statements of their rights and powers under that Act as may be so prescribed; (4) determining the age of patients; and (5) enabling the functions of nearest relatives to be delegated in certain circumstances: see s 32(2) (amended by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 2).

9 I.e. subject to the power to authorise three or more members of an authority, trust (other than an NHS foundation trust) or body, or three or more members of a committee or sub-committee of that authority, trust or body, to make orders for discharge, under the Mental Health Act 1983 s 23(4) (as amended): see PARA 523 post.

10 For the meaning of 'managers' see PARA 439 ante.

11 For the meaning of 'local social services authority' see PARA 424 ante.

12 For the meaning of 'health authority' see PARA 414 note 6 ante.

13 For the meaning of 'special health authority' see PARA 410 note 10 ante.

14 For the meaning of 'primary care trust' see PARA 414 note 6 ante.

15 As to NHS trusts and NHS foundation trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq.

16 Such regulations may in particular provide for the circumstances and conditions under which functions may be performed by officers or other persons acting on behalf of the managers, authorities or trusts: Mental

Health Act 1983 s 32(3) (amended by the National Health Service and Community Care Act 1990 s 66(1), Sch 9 para 24(5); the Health Authorities Act 1995 s 2(1), Sch 1 para 107(4); the Health and Social Care (Community Health and Standards) Act 2003 s 34, Sch 4 paras 50, 55; and the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 para 16(1), (6))). As to the regulations that have been made see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, regs 3(6), 4(2).

UPDATE

442 Regulations for compulsory admission, reception and removal

NOTES 2, 16--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

NOTE 8--Head (3). Words 'or to after-care under supervision' omitted: Mental Health Act 1983 s 32(2) (amended by Mental Health Act 2007 Sch 3 para 15).

NOTE 16--1983 Act s 32(3) further amended: Mental Health Act 2007 s 45(2); SI 2007/961.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(1) IN GENERAL/443. Correspondence of detained patients.

443. Correspondence of detained patients.

Any postal packet¹ addressed to any person by a patient² detained in a hospital³ and delivered by the patient for dispatch may be withheld from the postal operator⁴ concerned if the addressee has requested⁵ that communications addressed to him by that patient should be withheld⁶.

Special provisions apply to the post to and from patients detained in hospitals at which high security psychiatric services are provided⁷: a postal packet sent by such a patient may be withheld if the managers consider that it is likely to cause distress to the addressee or any other person⁸ or cause danger to anyone⁹. A packet addressed to such a patient may be withheld from that patient if, in the opinion of the managers, it is necessary in the interests of safety of the patient or for the protection of others¹⁰.

The managers of a hospital may inspect and open any postal packet for determining whether the provisions described above apply and may also withhold anything contained in the packet¹¹. Where a postal packet or anything in it is withheld¹², the managers must record that fact in writing¹³ and, where the withholding is to prevent distress or danger¹⁴, give notice of it in writing within seven days to the patient and, if known, to the person by whom the packet was sent¹⁵. The functions of the managers may be discharged on their behalf by appointed staff members¹⁶.

However, no postal packet which is delivered for dispatch by a patient may be withheld if the packet is addressed¹⁷ to any of the following¹⁸: (1) any Minister of the Crown or the Scottish ministers, or member of either House of Parliament or member of the Scottish Parliament or of the Northern Ireland Assembly¹⁹; (2) the master or any other officer of the Court of Protection²⁰ or any of the Lord Chancellor's Visitors²¹; (3) the Parliamentary Commissioner for Administration²², the Scottish Public Services Ombudsman, the Welsh Administration Ombudsman²³, the Health Service Commissioner for England, the Health Service Commissioner for Wales²⁴ or a local commissioner²⁵; (4) a mental health review tribunal²⁶; (5) a strategic health authority²⁷, health authority²⁸, special health authority²⁹, primary care trust³⁰, local social services authority³¹, community health council³², patients' forum³³ or local probation board³⁴; (6) a provider of a patient advocacy and liaison service³⁵ for the assistance of patients at the hospital and their families and carers³⁶; (7) a provider of independent advocacy services³⁷ for the patient³⁸; (8) the managers of the hospital in which the patient is detained³⁹; (9) any legally qualified person instructed by the patient to act as his legal adviser⁴⁰; or (10) the European Commission of Human Rights or the European Court of Human Rights⁴¹.

The Mental Health Act Commission⁴² must review any decision by the managers of a hospital providing high security psychiatric services to withhold a postal packet (or anything in it) in order to prevent distress or danger⁴³ if: (a) where the packet is addressed by a patient, an application is made by the patient; or (b) where the packet is addressed to a patient, an application is made either by the patient or by the addressor of the packet⁴⁴. Any such application must be made within six months of notification of the packet being withheld⁴⁵. If on application the Commission directs that the postal packet must not be withheld, the managers of the hospital must comply with such a direction⁴⁶. The Secretary of State may by regulations make provision with respect to the making and determination of such applications⁴⁷.

1 'Postal packet' means a letter, parcel, packet or other article transmissible by post: Post Office Act 2000 s 125(1); definition applied by the Mental Health Act 1983 s 134(9) (amended by the Postal Services Act 2000 s 127(4), (6), Sch 8 Pt II para 19(1), (3), Sch 9). See POST OFFICE.

2 For the meaning of 'patient' see PARA 435 ante.

3 For the meaning of 'hospital' see PARA 417 ante; definition applied by the Mental Health Act 1983 s 134(9).

4 'Postal operator' is a person who provides the service of conveying postal packets from one place to another by post or any of the incidental services of receiving, collecting, sorting and delivering such packets: Post Office Act 2000 s 125(1); definition applied by the Mental Health Act 1983 s 134(9) (as amended: see note 1 supra). See POST OFFICE.

5 The request must be made in writing by a notice given to the managers of the hospital, the registered medical practitioner in charge of the treatment of the patient or the Secretary of State: *ibid* s 134(1). For the meaning of 'managers' see PARA 439 ante. As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

6 *Ibid* s 134(1)(a) (s 134(1) amended by the Postal Services Act 2000 Sch 8 Pt II para 19(1), (2)).

The Mental Health Act 1983 s 134 (as amended; prospectively amended) does not confer on the management of a hospital the power to require a publisher to return a manuscript that has been written and posted to him by a patient: *Broadmoor Hospital Authority v R* [2000] QB 775, [2000] 2 All ER 727, CA.

7 The Code of Practice (1999) PARA 22.15 advises managers to have a written policy concerning implementation of these powers, which should be discussed with the Mental Health Act Commission. The Code of Practice refers to special hospitals, but these are now known as hospitals at which high security psychiatric services are provided: see PARA 418 ante. As to the Code of Practice see PARA 436 ante. As to the constitution and functions of the Mental Health Act Commission see PARA 413 ante.

8 *Ie* not being a person on the staff of the hospital.

9 Mental Health Act 1983 s 134(1)(b) (amended by the Health Act 1999 s 65, Sch 4 paras 65, 68(a)). This is subject to the Mental Health Act 1983 s 134(3) (as amended): see heads (1)-(10) in the text.

10 *Ibid* s 134(2) (amended by the Health Act 1999 Sch 4 paras 65, 68(b)). This is subject to the Mental Health Act 1983 s 134(3) (as amended): see heads (1)-(10) in the text. See also the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 17(2).

11 Mental Health Act 1983 s 134(4). See also the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 17(1).

12 *Ie* under the Mental Health Act 1983 s 134(1) (as amended) or s 134(2).

13 *Ibid* s 134(5). See also the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 17(2).

14 *Ie* under the Mental Health Act 1983 s 134(1)(b) or s 134(2) (as amended).

15 *Ibid* s 134(6). See also the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 17(3).

16 Mental Health Act 1983 s 134(7).

17 See, however, the text and notes 1-6 supra.

18 *Ie* listed in the Mental Health Act 1983 s 134(3) (as amended): see heads (1)-(10) in the text.

19 *Ibid* s 134(3)(a) (amended by the Northern Ireland Act 1998 s 99, Sch 13 para 5(1), (2); and the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999, SI 1999/1820, art 4, Sch 2 Pt I para 71(1), (2)).

20 As to the Court of Protection see PARA 674 et seq post.

21 Mental Health Act 1983 s 134(3)(b). As to the Lord Chancellor's Visitors see PARA 747 post. As from a day to be appointed, s 134(3)(b) is substituted so as to refer to any judge or officer of the Court of Protection, any of the Court of Protection Visitors or any person asked by that court for a report under the Mental Capacity Act 2005 s 49 (see PARA 751 post) concerning the patient: Mental Health Act 1983 s 134(3)(b) (prospectively substituted by the Mental Capacity Act 2005 s 67(1), Sch 6 para 29(1), (2)). At the date at which this volume states the law no such day had been appointed. As to the Mental Capacity Act 2005 generally see PARA 406 ante. See also PARA 749 et seq post.

- 22 As to the Parliamentary Commissioner for Administration see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARAS 41-43.
- 23 As to the Welsh Administration Ombudsman see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 45.
- 24 As to the Health Service Commissioners see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 54; HEALTH SERVICES vol 54 (2008) PARA 641 et seq.
- 25 Mental Health Act 1983 s 134(3)(c) (amended by the Government of Wales Act 1998 s 125, Sch 12 para 22; and the Scottish Public Services Ombudsman Act 2002 (Consequential Provisions and Modifications) Order 2004, SI 2004/1823, art 9). As to local commissioners see the Local Government Act 1974 Pt III (ss 23-34); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARAS 44-46; LOCAL GOVERNMENT vol 69 (2009) PARA 839 et seq.
- 26 Mental Health Act 1983 s 134(3)(d). As to mental health review tribunals see PARA 560 et seq post.
- 27 For the meaning of 'strategic health authority' see PARA 439 note 6 ante.
- 28 For the meaning of 'health authority' see PARA 414 note 6 ante.
- 29 For the meaning of 'special health authority' see PARA 410 note 10 ante.
- 30 For the meaning of 'primary care trust' see PARA 414 note 6 ante.
- 31 As to local social services authorities see PARA 424 ante.
- 32 As to community health councils see HEALTH SERVICES vol 54 (2008) PARAS 74, 534.
- 33 As to patients' forums see HEALTH SERVICES vol 54 (2008) PARA 535.
- 34 Mental Health Act 1983 s 134(3)(e) (amended by the Health Authorities Act 1995 s 2(1), Sch 1 para 107(10); the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II paras 72, 74; the National Health Service Reform and Health Care Professions Act 2002 s 19(6); the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 para 16(1), (7); and the National Health Service Reform and Health Care Professions Act 2002 (Supplementary, Consequential etc Provisions) Regulations 2002, SI 2002/2469, reg 4, Sch 1 Pt 1 para 10(1), (2)) As to local probation boards see the Criminal Justice and Court Services Act 2000 s 4; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 733-760.
- 35 'Patient advocacy and liaison service' means a service of a description prescribed by regulations made by the Secretary of State: Mental Health Act 1983 s 134(3A)(a) (s 134(3A) added by the Health and Social Care Act 2001 s 67(1), Sch 5 Pt 1 para 6(1), (3)).
See, in relation to England, the Mental Health (Correspondence of Patients, Patient Advocacy and Liaison Services) Regulations 2003, SI 2003/2042 (amended by SI 2004/696).
- 36 Mental Health Act 1983 s 134(3)(ea) (s 134(3)(ea), (eb) added by the Health and Social Care Act 2001 s 67(1), Sch 5 Pt 1 para 6(1), (2)).
- 37 'Independent advocacy services' means services provided under arrangements under the National Health Service Act 1977 s 19A (as added and amended) (see HEALTH SERVICES vol 54 (2008) PARA 597): Mental Health Act 1983 s 134(3A)(b) (as added: see note 35 supra).
- 38 Ibid s 134(3)(eb) (as added: see note 36 supra).
- 39 Ibid s 134(3)(f).
- 40 Ibid s 134(3)(g).
- 41 Ibid s 134(3)(h). As to the European Commission of Human Rights and the European Court of Human Rights see CONSTITUTIONAL LAW AND HUMAN RIGHTS.
- 42 See PARA 413 ante.
- 43 Ie under the Mental Health Act 1983 s 134(1)(b) (as amended) or s 134(2): see the text and notes 7-10 supra.
- 44 Ibid s 121(7). See the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 18. See also *Herczegfalvy v Austria* (Application No 10533/83) (1992) 15 EHRR 437.

45 Mental Health Act 1983 s 121(7).

46 Ibid s 121(8).

47 Ibid s 121(9). See the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 18.

UPDATE

443 Correspondence of detained patients

NOTES 10-15, 35, 44, 47--SI 1983/893, SI 2003/2042 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

NOTE 5--Reference to registered medical practitioner in charge of the treatment of the patient now to approved clinician with overall responsibility for the patient's case: Mental Health Act 1983 s 134(1) (amended by Mental Health Act 2007 s 14(4)).

TEXT AND NOTES 17-41--Also, head (11) any of the Welsh Ministers, the Counsel General to the Welsh Assembly government or a member of the National Assembly for Wales: Mental Health Act 1983 s 134(3)(aa) (added by SI 2007/1388).

NOTE 21--Day now appointed: SI 2007/1897.

TEXT AND NOTE 25--Mental Health Act 1983 s 134(3)(c) further amended: Public Services Ombudsman (Wales) Act 2005 Sch 6 para 21, Sch 7.

NOTE 34--Mental Health Act 1983 s 134(3)(e) further amended and National Health Service Reform and Health Care Professions Act 2002 s 19(6) repealed: Local Government and Public Involvement in Health Act 2007 Sch 18 Pt 18; SI 2007/961; SI 2008/912.

NOTE 37--Definition of 'independent advocacy services' amended: 1983 Act s 134(3A) (amended by National Health Service (Consequential Provisions) Act 2006 Sch 1 para 68; and Mental Health Act 2007 s 30(3)).

TEXT AND NOTES 42-47--Repealed: Health and Social Care Act 2008 s 52(4), Sch 15 Pt 1.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(1) IN GENERAL/444. Visiting detained patients.

444. Visiting detained patients.

Provision is made¹ in relation to the visiting of patients² in hospitals³ or in registered establishments⁴. All detained patients are entitled to maintain contact with and be visited by anyone they wish to see, subject to limited restrictions which are imposed only in exceptional circumstances⁵. The two main grounds justifying exclusion of a visitor are restriction on clinical grounds⁶, and restriction on security grounds⁷.

While for children may visit patients, there should be regularly reviewed written policies on the relevant arrangements which should be drawn up in consultation with local social services authorities⁸, and a visit by a child should only take place following a decision that it would be in the child's best interests⁹.

The hospital or registered establishment should be sufficiently flexible to enable regular visits to the patient, if the patient so wishes¹⁰. Every effort must be made to help the patient to make contact with relatives, friends and supporters; and, in particular, patients should have readily accessible and appropriate daytime telephone facilities¹¹, and no restrictions should be placed upon dispatch and receipt of their mail over and above those referred to in the Mental Health Act 1983¹².

1 See Code of Practice (1999) Ch 26. As to the Code of Practice see PARA 436 ante.

2 For the meaning of 'patient' see PARA 435 ante.

3 For the meaning of 'hospital' see PARA 417 ante.

4 For the meaning of 'registered establishment' see PARA 421 ante.

5 See Code of Practice (1999) PARA 26.1. Prohibition of a visit should only occur after all other means to deal with the problem have been exhausted: see Code of Practice (1999) PARA 26.1. Any decision to exclude a visitor must be fully documented and available for independent scrutiny by the Mental Health Act Commission: see Code of Practice (1999) PARA 26.1. As to the constitution and functions of the Mental Health Act Commission see PARA 413 ante. Hospital managers should regularly monitor the exclusion of visitors: see Code of Practice (1999) PARA 26.6. For the meaning of 'managers' see PARA 439 ante. See *R (on the application of L) v Secretary of State for Health* [2001] 1 FCR 326, [2001] 1 FLR 406.

6 See Code of Practice (1999) PARA 26.2(a). Sometimes contact may be anti-therapeutic to such an extent that a discernible arrest of progress or even deterioration in the patient's mental state is evident and can reasonably be anticipated if the contact is not restricted: Code of Practice (1999) PARA 26.2(a).

7 See Code of Practice (1999) PARA 26.2(b). A particular visitor's behaviour may be so disruptive that exclusion is necessary as a last resort; examples of such behaviour include incitement to abscond, smuggling of illicit drugs or alcohol, transfer of potential weapons, unacceptable aggression, or unauthorised media access: see Code of Practice (1999) PARA 26.2(b).

8 For the meaning of 'local social services authority' see PARA 424 ante.

9 See Code of Practice (1999) PARA 26.3. See *R (on the application of L) v Secretary of State for Health* [2001] 1 FCR 326, [2001] 1 FLR 406 (child nephews and nieces of patient convicted of murder not permitted to visit).

10 See Code of Practice (1999) PARA 26.4.

11 As to telephone monitoring and the European Convention on Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 8 see *R (on the application of N) v Ashworth Special Hospital* (11 May 2001) Lexis; and see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 149 et seq.

12 See Code of Practice (1999) PARA 26.4. The restrictions are those referred to in the Mental Health Act 1983 s 134 (as amended) (see PARA 443 ante).

UPDATE

444 Visiting detained patients

NOTE 5--Mental Health Act Commission dissolved and functions transferred, in relation to England, to the Care Quality Commission (see PARA 413), and, in relation to Wales, to the Welsh Ministers: see the Health and Social Care Act 2008 ss 1(2), 52(3).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(1) IN GENERAL/445. Members of Parliament.

445. Members of Parliament.

Where a member of the House of Commons¹ is authorised to be detained on the ground, however formulated, that he is suffering from mental illness², it is the duty of the court, authority or person on whose order or application, and of any medical practitioner on whose recommendation or certificate, the detention was authorised, and of the person in charge of the hospital or other place in which the member is authorised to be detained, to notify the Speaker of the House of Commons³ that the detention has been authorised⁴.

1 As to the House of Commons generally see PARLIAMENT vol 78 (2010) PARA 892 et seq.

2 This provision does not apply if the Member of Parliament is suffering from any form of mental disorder other than mental illness. Mental disorder is a disqualification at common law for sitting and voting in the House of Commons: see PARLIAMENT vol 78 (2010) PARA 900. For the meaning of 'mental disorder' see PARA 402 ante.

3 As to the Speaker of the House of Commons see PARLIAMENT vol 78 (2010) PARA 931.

4 Mental Health Act 1983 s 141(1). As to the procedure to be followed where the Speaker receives notification under s 141(1) see s 141(2)-(10) (s 141(8)-(10) as added); and PARLIAMENT vol 78 (2010) PARA 1094. Section 141 (as amended) extends to Scotland: see s 146 (prospectively amended); and PARA 405 ante.

UPDATE

445 Members of Parliament

TEXT AND NOTE 2--Reference to mental illness now to mental disorder (see PARA 402): Mental Health Act 1983 s 141(1) (amended by Mental Health Act 2007 Sch 1 para 16(2)).

NOTE 4--Mental Health Act 1983 s 141(4)-(6) amended, s 141(6A)-(6C) added: Mental Health Act 2007 Sch 1 para 16(3)-(5), Sch 3 para 33.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(1) IN GENERAL/446. Persons in legal custody.

446. Persons in legal custody.

Any person required or authorised by or by virtue of the Mental Health Act 1983¹ to be conveyed³ to any place or to be kept in custody or detained in a place of safety⁴, or at any place to which he is taken by direction of the Secretary of State⁵ in the interests of justice or for the purposes of any public inquiry⁶, is, while being so conveyed, detained or kept, as the case may be, deemed to be in legal custody⁷.

A constable or any other person required or authorised by or by virtue of that Act to take any person into custody, or to convey or detain any person, has, for the purposes of taking him into custody or conveying or detaining him, all the powers, authorities, protection and privileges which a constable has within the area for which he acts as constable⁸.

1 Eg under the Mental Health Act 1983 s 6(1) (pending admission pursuant to an application for compulsory admission to hospital: see PARA 464 post); s 18(1) (being absent from hospital without leave: see PARA 507 post); s 18(3) (being absent without leave from the place where his guardian requires him to live: see PARA 477 post); while being transferred in pursuance of regulations made under s 19 (as amended) (see PARA 511 et seq post); s 35(4) (pending admission to hospital pursuant to a remand for report: see PARA 489 post); s 36(3) (pending admission to hospital pursuant to a remand for treatment: see PARA 489 post); ss 37(4), 40(1) (s 37(4) as amended) (pending admission pursuant to a hospital order: see PARAS 491, 495 post); ss 38(4), 40(3) (pending admission pursuant to an interim hospital order: see PARAS 491, 495 post); s 42(4) (conditionally discharged restricted patient recalled: see PARA 524 post); ss 43, 44 (s 43 as amended) (where a magistrates' court commits a person to the Crown Court with a view to a restriction order being made: see PARA 498 post); pursuant to a transfer direction under ss 47, 48 (as amended) (see PARAS 535-536 post); under the provisions for removal and return of patients within the United Kingdom in Pt VI (ss 80-92) (as amended) (see PARAS 509-510, 542-548 post); and under the provisions for the removal of persons to a place of safety in ss 135, 136 (s 135 as amended) (see PARAS 549-550 post).

3 'Convey', for these purposes, includes any other expression denoting removal from one place to another: *ibid* s 137(3). Section 137 extends to Scotland: see s 146 (prospectively amended); and PARA 405 ante.

4 For the meaning of 'place of safety' for the purposes of *ibid* Pt III (ss 35-55) (as amended) see PARA 495 note 4 post; and for its meaning for the purposes of s 135 (as amended) and s 136 see s 135(6) (as amended); and PARA 549 note 10 post.

5 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

6 *Ie* under the Mental Health Act 1983 s 42(6) (see PARA 501 post).

7 *Ibid* s 137(1). As to the equivalent Scottish provisions see the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 11. As to escape from custody see PARA 447 post.

8 Mental Health Act 1983 s 137(2). The effect of these provisions is, *inter alia*, to enable the authorised person to invoke the assistance of others if necessary. As to the office of constable see POLICE vol 36(1) (2007 Reissue) PARA 101 et seq.

The power does not include the use of force to enter premises to remove someone believed to be suffering from mental disorder or liable to be taken into custody under the Mental Health Act 1983 (the power under s 135 (as amended) (see PARA 549 post) should be used instead): see *R v Broadmoor Special Hospital Authority, ex p S* [1998] 8 LS Gaz R32, CA; *R v Rosso* [2003] EWCA Crim 3242, [2003] All ER (D) 381 (Nov). The power cannot be used to detain people in hospital.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(1) IN GENERAL/447. Retaking of persons who escape from legal custody.

447. Retaking of persons who escape from legal custody.

A person who escapes from legal custody¹ may be retaken by the person who had his custody immediately before his escape, or by any constable or approved social worker². If at the time of the escape the person escaping was liable to be detained in a hospital³ or under guardianship⁴ he may also be retaken by any other person who could take him into custody if he were absent without leave⁵; but he may not be retaken by any person after the expiration of the period⁶ within which he could have been retaken had he absented himself without leave on the day of his escape⁷, unless he is subject to a restriction order or an order or direction having the same effect⁸. Such a patient can be retaken at any time while the restriction is in force⁹.

A person who escapes while being taken to or detained in a place of safety¹⁰ may not be retaken after the expiration of a period of 72 hours beginning with the time of escape or the period during which he is liable to be detained, whichever expires first¹¹.

In computing the period of 28 days during which a hospital order constitutes authority for a person's conveyance and admission to and detention in hospital¹², or during which a court may direct his conveyance to and detention in a place of safety¹³, time spent at large by a patient who escapes from legal custody before he is retaken is excluded¹⁴.

Where a patient is absent without leave on the day that he would otherwise cease to be liable to be detained or subject to guardianship, or within the period of one week ending on that day, he does not cease to be so liable or subject¹⁵.

1 le legal custody by virtue of the Mental Health Act 1983 s 85(6) (see PARA 546 post) or s 137 (see PARA 446 ante). This is distinct from absence without leave from hospital (see PARA 507 post) or guardianship (see PARA 477 post). It is an offence to induce or knowingly to assist a person to escape (see PARA 770 post); but a person detained under the Mental Health Act 1983 who escapes does not thereby commit an offence: see *R v Criminal Injuries Compensation Board, ex p Lawton* [1972] 3 All ER 582 at 584, [1972] 1 WLR 1589 at 1592, DC. The powers of arrest under the Mental Health Act 1983 s 18 (as amended) and s 138 are specifically preserved by the Police and Criminal Evidence Act 1984 s 26(2), Sch 2 (as amended): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 927.

2 Mental Health Act 1983 s 138(1)(a). For the meaning of 'approved social worker' see PARA 427 ante. As to the Scottish provisions relating to persons in legal custody see the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 11; and PARA 446 ante. As to patients absent from hospitals in Scotland see art 8; and PARA 508 post.

3 le within the meaning of the Mental Health Act 1983 Pt II (ss 2-34) (as amended) (see PARA 417 ante). As to the application of Pt II (as amended) to patients detained under Pt III (ss 35-55) (as amended) (patients concerned in criminal proceedings or under sentence) see s 145(3); and PARA 487 post. For the meaning of 'patient' see PARA 435 ante.

4 le under the Mental Health Act 1983.

5 le under *ibid* s 18 (as amended) or under s 88 (as amended), as the case may be: see PARA 507 post. If a person liable to be detained in a hospital escapes: (1) while being transferred to or from the hospital under the regulations for the transfer of patients (see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, regs 7-9 (as amended); and PARAS 511-516 post) or in pursuance of any order, direction or authorisation under the Mental Health Act 1983 Pt III (as amended) or Pt VI (as amended) (other than under s 35, s 36, s 38, s 53 (as amended), s 83 or s 85) (see PARAS 486 et seq, 542 et seq post) or under s 123 (as amended) (see PARA 419 ante); or (2) while being taken to or detained in a place of safety in pursuance of an order under Pt III (as amended) (other than under s 35, s 36 or s 38) (see PARAS 489-491, 495 post) pending his admission to that hospital, he is liable to be retaken as if he were liable to be detained in that hospital and, if he had not been previously received there, as if he had been so received: s 138(4).

- 6 As to such period see *ibid* s 18(4) (as substituted); and PARA 507 post. However, a patient detained for a short period, whether for assessment (see PARA 460 post) or as an in-patient (see PARA 463 post), cannot be taken into custody if the period for which he was liable to be detained has expired: s 18(5).
- 7 *Ibid* s 138(2). As to the retaking of patients absent without leave from hospital see PARA 507 et seq post.
- 8 *Ie* an order or direction under *ibid* Pt III (as amended): see ss 41, 44, 46, 49 (as amended); and PARAS 496-499, 537 post.
- 9 See *ibid* s 41(3)(d).
- 10 *Ie* under *ibid* s 135 (as amended) (see PARA 549 post) or s 136 (see PARA 550 post). For the meaning of 'place of safety' for this purpose see s 135(6) (as amended); and PARA 549 note 10 post.
- 11 *Ibid* s 138(3).
- 12 *Ie* for the purposes of *ibid* s 40(1) (see PARA 494 post).
- 13 *Ie* for the purposes of *ibid* s 37(4), (5) (as amended) (see PARA 491 post).
- 14 See *ibid* s 138(5).
- 15 See *ibid* s 20(1), s 21 (as substituted), ss 21A, 21B (both as added); and PARAS 518, 521 post.

UPDATE

447-449 Retaking of persons who escape from legal custody ... Signature and proof of documents

SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

447 Retaking of persons who escape from legal custody

TEXT AND NOTE 2--Reference to approved social worker now to approved mental health professional: Mental Health Act 1983 s 138(1)(a) (amended by Mental Health Act 2007 Sch 2 para 10(c)).

TEXT AND NOTES 3-5--This applies also to a community patient who was recalled to hospital under the Mental Health Act 1983 s 17E (see PARA 528A): s 138(1)(b) (amended by Mental Health Act 2007 Sch 3 para 32).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(1) IN GENERAL/448. Service of documents.

448. Service of documents.

An application for the admission of a patient¹ to hospital² under the statutory provisions for compulsory admission and guardianship³ may be served by delivering the application to an authorised officer of the hospital concerned⁴.

An order made by the nearest relative for the discharge of a detained patient⁵, or a notice given for the purpose of making such an order⁶, must be served⁷ either by delivery at the hospital where the patient is liable to be detained to an officer of the managers⁸ of that hospital authorised by them to receive the notice or order, or by sending it by pre-paid post addressed to those managers⁹ at that hospital¹⁰.

Any other document¹¹ required or authorised to be served on any authority, body or person by or under those statutory provisions may be served either: (1) by delivering it to the authority, body or person upon whom it is to be served or upon any person authorised to receive it by the authority, body or person concerned¹²; or (2) by sending it by pre-paid post addressed to the authority or body at its registered or principal office or to the person upon whom it is to be served at his usual or last-known residence¹³.

1 For the meaning of 'patient' see PARA 435 ante.

2 For the meaning of 'hospital' see PARA 417 ante.

3 I.e. the Mental Health Act 1983 Pt II (ss 2-34) (as amended): see PARAS 460-462 post.

4 Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 3(2).

5 I.e. under the Mental Health Act 1983 s 23(2) (see PARA 523 post).

6 I.e. under ibid s 25(1) (see PARA 525 post).

7 'Served' includes addressed, delivered, given, forwarded, furnished or sent: Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 2(1).

8 For the meaning of 'managers' see PARA 439 ante.

9 Any document to be addressed, in accordance with these provisions, to the managers of a hospital is deemed to be properly addressed if addressed to the administrator of that hospital: Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 3(5).

10 Ibid reg 3(3).

11 'Document' means any application, recommendation, record, report, order, notice or other document: ibid reg 2(1).

12 Ibid reg 3(1)(a).

13 Ibid reg 3(1)(b).

UPDATE

447-449 Retaking of persons who escape from legal custody ... Signature and proof of documents

SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(1) IN GENERAL/449. Signature and proof of documents.

449. Signature and proof of documents.

Any document¹ required or authorised by or under the statutory provisions for compulsory admission and guardianship² and purporting to be signed by a person so required or authorised to do so, must be received in evidence and is deemed to be such a document without further proof, unless the contrary is shown³.

¹ For the meaning of 'document' see PARA 448 note 11 ante.

² Ie under the Mental Health Act 1983 Pt II (ss 2-34) (as amended) or the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893 (as amended).

³ Ibid reg 3(4). This is subject to the provisions of the Mental Health Act 1983 ss 6(3), 8(3) as to proof of applications for admission or guardianship: any such application which appears to be duly made and to be founded on the necessary medical recommendations may be acted upon without further proof of the signature or qualification of the person by whom the application or any such medical recommendation is given or made, or of any matter of fact or opinion stated in the application: see PARAS 465, 472 post.

UPDATE

447-449 Retaking of persons who escape from legal custody ... Signature and proof of documents

SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(2) APPROVED SOCIAL WORKERS/450. Appointment and functions of approved social workers.

(2) APPROVED SOCIAL WORKERS

450. Appointment and functions of approved social workers.

Every local social services authority¹ must appoint sufficient approved social workers² to carry out the functions of such social workers under the Mental Health Act 1983³. The functions of approved social workers include making applications⁴ for compulsory admission to hospital for assessment⁵ (including emergency applications⁶) or for treatment⁷ or for reception into guardianship⁸, gaining access to patients under guardianship⁹, applying to a county court for guardianship to be transferred¹⁰, returning detained patients who are absent without leave¹¹, applying to a county court for the appointment of an acting nearest relative for a patient¹² or for the variation of such an order¹³, conveying to hospital patients subject to hospital orders¹⁴, retaking patients who are absent without leave from hospitals in Northern Ireland, England¹⁵, Wales¹⁶, the Channel Islands or Isle of Man¹⁷, entering and inspecting certain premises where mentally disordered persons are living¹⁸, laying information to obtain a warrant to search for and remove certain persons believed to be suffering from mental disorder¹⁹, interviewing persons found in public places²⁰, and retaking persons who escape from legal custody²¹.

1 For the meaning of 'local social services authority' see PARA 424 ante.

2 For the meaning of 'approved social worker' see PARA 427 ante.

3 Mental Health Act 1983 s 114(1). As to the role of approved social workers generally see Department of Health Circular No LAC(86)15.

4 Mental Health Act 1983 s 11(1).

5 See *ibid* s 2 (see PARA 460 post).

6 See *ibid* s 4(2); and PARA 462 post.

7 See *ibid* s 3; and PARA 461 post.

8 See *ibid* s 7; and PARA 469 post.

9 See *ibid* s 8(1)(c); and PARA 471 post.

10 See *ibid* s 10(3); and PARA 479 post.

11 See *ibid* s 18(1); and PARA 507 post.

12 See *ibid* s 29(2); and PARA 456 post.

13 See *ibid* s 30(2); and PARA 457 post.

14 See *ibid* s 40(1)(a); and PARA 494 post.

15 For the meaning of 'England' see PARA 405 note 6 ante.

16 For the meaning of 'Wales' see PARA 405 note 7 ante.

17 See the Mental Health Act 1983 ss 87-89 (as amended); and PARAS 508-509 post.

18 See *ibid* s 115; and PARA 427 ante.

- 19 See *ibid* s 135(1), (4) (as amended); and PARA 549 post.
- 20 See *ibid* s 136(2); and PARA 550 post.
- 21 See *ibid* s 138(1); and PARA 447 ante. For the meaning of 'legal custody' see s 137(1); and PARA 446 ante.

UPDATE

450 Appointment and functions of approved [mental health professionals]

TEXT AND NOTES 1-3--References to approved social workers are now to approved mental health professionals: Mental Health Act 1983 s 114 (substituted by Mental Health Act 2007 s 18). See Mental Health (Approved Mental Health Professionals) (Approval) (England) Regulations 2008, SI 2008/1206; Mental Health (Approval of Persons to be Approved Mental Health Professionals) (Wales) Regulations 2008, SI 2008/2430. As to approval of courses etc for approved mental health professionals see Mental Health Act 1983 s 114A; and PARA 427.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(2) APPROVED SOCIAL WORKERS/451. Applications by approved social workers.

451. Applications by approved social workers.

It is the duty of an approved social worker¹ to make an application for compulsory admission to hospital² or for guardianship³ of a patient⁴ if he is satisfied that such an application ought to be made and, having regard to any wishes expressed by the patient's relatives⁵ or any other relevant circumstances, he is of the opinion that it is necessary or proper for the application to be made by him⁶.

However, before applying for a patient to be admitted to hospital, an approved social worker must interview the patient in a suitable manner and satisfy himself that in all the circumstances detention in hospital is the most appropriate way of providing the care and medical treatment of which the patient stands in need⁷.

An approved social worker cannot apply for admission for treatment⁸ or for guardianship⁹ if the patient's nearest relative¹⁰ has notified him or the local social services authority by which he is appointed that the relative objects to the application being made; nor can he make such an application without consulting the person, if any, who appears to be the patient's nearest relative, unless it appears to the approved social worker that such consultation is not reasonably practicable or would involve unreasonable delay¹¹. Further, if an approved social worker applies for a patient to be admitted for assessment¹², he must, before or within a reasonable time after such application, take such steps as are practicable to inform the person who appears to be the patient's nearest relative both of the application and of the relative's power to discharge the patient¹³. However, it is the duty of a local social services authority, if so required by the nearest relative of a patient¹⁴, to direct an approved social worker to consider the case with a view to making an application for admission to hospital, and if the approved social worker decides not to apply he must inform the relative of his reasons in writing¹⁵.

1 For the meaning of 'approved social worker' see PARA 427 ante.

2 As to such applications see PARAS 460-462 post. For the meaning of 'hospital' see PARA 417 ante. The duty is on the approved social worker and not on the employing authority, and the approved social worker must exercise his or her own independent judgment on the basis of all available material and take account of medical recommendations: *St George's Healthcare NHS Trust v S, R v Collins, ex p S* [1998] 3 All ER 673, CA. The approved social worker must give reasons to the patient if the application is inconsistent with a decision of a mental health review tribunal: *R (on the application of Von Brandenburg (aka Hanley)) v East London and the City Mental Health Trust* [2003] UKHL 58, [2004] 1 All ER 400.

3 As to guardianship applications see PARA 469 post.

4 I.e. a patient who is within the area of the local social services authority for which the officer is appointed: Mental Health Act 1983 s 13(1). However, an application may be made outside that area: s 13(3). For the meaning of 'patient' see PARA 435 ante.

5 For the meaning of 'relative' see PARA 452 post.

6 Mental Health Act 1983 s 13(1). Nothing in this provision requires or authorises an approved social worker to apply in contravention of s 11(4) (see the text and notes 8-11 infra), or restricts his power to make any application under the Mental Health Act 1983: s 13(5).

For guidance on the individual professional responsibility of the approved social worker see Code of Practice (1999) PARAS 2.11-2.14; for guidance on decisions not to apply for admission see Code of Practice (1999) PARAS 2.31-2.32; and for guidance on disagreements and the choice of applicant see Code of Practice (1999) PARAS 2.33-2.36. The Code of Practice (1999) PARA 2.35 states that the approved social worker is usually the right applicant, bearing in mind professional training and knowledge of the legislation and of local resources,

together with the potential adverse effect that an application by the nearest relative (see PARA 454 post) might have on the relationship with the applicant. As to the Code of Practice see PARA 436 ante.

7 Mental Health Act 1983 s 13(2). For guidance on how to interview the patient in a suitable manner see Code of Practice (1999) PARA 2.12; and for the factors to be taken into account in assessing patients see Code of Practice (1999) PARAS 2.1-2.6. As to the meaning of 'medical treatment' see PARA 552 post. An interview under the Mental Health Act 1983 s 4(2) (see PARA 462 post) may also be also used for s 3 purposes (see PARA 461 post): *Re GM (Patient: Consultation)* [2000] 1 MHLR 41.

8 le under the Mental Health Act 1983 s 3 (see PARA 461 post).

9 le under ibid s 7 (see PARA 469 post).

10 For the meaning of 'nearest relative' see PARA 453 post.

11 Mental Health Act 1983 s 11(4). This provision does not apply to an application for admission of a minor who is a ward of court: s 33(1). Such applications can only be made with leave of the court: s 33(1). See generally CHILDREN AND YOUNG PERSONS.

Although it is desirable for consultation under s 11(4) to be conducted by the approved social worker, consultation may be delegated if it is full and effective; the person appearing to be the nearest relative must at least be legally capable of being the nearest relative: *R v Managers of South Western Hospital, ex p M* [1993] QB 683, [1994] 1 All ER 161. Consultation of the nearest relative prior to seeing and interviewing the patient satisfies the requirements of the Mental Health Act 1983 s 11(4): *Re Whitbread, Whitbread v Kingston and District NHS Trust* (1997) 39 BMLR 94, CA. Lack of objection by the nearest relative is sufficient for the purposes of the Mental Health Act 1983 s 11(4), positive consent is not necessary: *R (on the application of Ganatra) v Ealing London Borough Council* [2002] EWHC 1112 (Admin), [2002] All ER (D) 294 (Apr). Consultation may not be appropriate if it would cause harm to the patient: see *Re P (Adoption: Natural Father's Rights)* [1995] 2 FCR 58, [1994] 1 FLR 771. 'Practicable' in the Mental Health Act 1983 s 11(4) does not mean 'possible': *R (on the application of WC) v South London and Maudsley NHS Trust and Orekeye* [2001] 1 MHLR 187. See also *JT v United Kingdom (Application 26494/95)* [2000] 1 FLR 909, ECtHR; *Re D (Mental Patient: Habeas Corpus)* [2001] 1 FCR 218, CA; and PARA 453 post. As to the use of the word 'practicable' in a different context see PARA 482 post.

The duty of the approved social worker to inform the nearest relative under the Mental Health Act 1983 s 11(3), (4) could interfere with the patient's rights under the European Convention on Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 8 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 149 et seq): see *R (on the application of E) v Bristol City Council* [2005] EWHC 74 (Admin), [2005] All ER (D) 57 (Jan) (where it was held that contacting the nearest relative would infringe the patient's Convention rights in circumstances where the patient had a poor relationship with the relative). However the Code of Practice para 2.16 states that 'practicability' refers to the availability of the nearest relative and not to the appropriateness of informing or consulting the person concerned.

12 le under the Mental Health Act 1983 s 2 or s 4: see PARAS 460, 462 post.

13 Ibid s 11(3). It is submitted that this provision applies to emergency applications, as these are applications for admission for assessment (see s 4(1)), and provision is made (in s 4(5)) for the modification of s 11 in respect of them: see PARA 480 post. As to the nearest relative's power to order discharge see s 23 (as amended); and PARA 523 post.

14 le a patient residing in its area.

15 Mental Health Act 1983 s 13(4).

UPDATE

451 Applications by approved [mental health professionals]

TEXT AND NOTES--References to approved social workers are now to approved mental health professionals: Mental Health Act 1983 ss 11(3), (4), 13 (ss 11(3), 13(2), (4), (5) amended, s 11(4), 13(1), (1A)-(1C), (3) substituted, by Mental Health Act 2007 s 22, Sch 2 paras 4(3), (4), 5).

NOTE 11--See *V v South London and Maudsley NHS Foundation Trust* [2010] All ER (D) 76 (Feb) (assumption by social worker that patient's nearest relative would consent meant that proper approach under 1983 Act s 11(4) had not been followed).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(3) RELATIVES/452. Meaning of 'relative'.

(3) RELATIVES

452. Meaning of 'relative'.

For the purposes of the statutory provisions relating to compulsory admission to hospital and reception into guardianship¹, a 'relative' of a patient² means any of the following: (1) husband or wife³; (2) son or daughter; (3) father or mother; (5) brother or sister; (6) grandparent; (7) grandchild; (8) uncle or aunt; (9) nephew or niece⁴; and (10) a person other than a relative, with whom the patient ordinarily resides (or, if the patient is an in-patient in hospital, last ordinarily resided before admittance) and with whom he has or had been ordinarily residing for a period of not less than five years⁵. Any relationship of the half-blood is treated as a relationship of the whole blood⁶. An illegitimate person is treated as the legitimate child of his mother and, if his father has parental responsibility for him⁷, his father⁸.

1 Ie the Mental Health Act 1983 Pt II (ss 2-34) (as amended), and such provisions of that Part as are applied to patients admitted under Pt III (ss 35-55) (as amended) by s 40(4), s 41(3) and Sch 1 (as amended): see PARAS 460 et seq, 487-489, 494, 496 post.

2 For the meaning of 'patient' generally see PARA 435 ante.

3 'Husband' or 'wife' includes a person who is living with the patient as the patient's husband or wife, as the case may be (or, if the patient is for the time being an in-patient in a hospital, was so living until the patient was admitted), and has been or had been so living for a period of not less than six months: Mental Health Act 1983 s 26(6). See, however, PARA 453 note 12 post.

4 Ibid s 26(1). An adopted person is treated as the child of the adoptive parent: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 323.

5 Ibid s 26(7). However, such a person cannot be treated as the nearest relative of a married person unless the husband or wife is disregarded under s 26(5)(b) (see PARA 453 post): s 26(7).

6 Ibid s 26(2). However, in ascertaining the person who is for these purposes to be treated as the nearest relative of the patient, relatives of the whole blood are preferred to relatives of the same description of the half-blood and the elder or eldest of two or more relatives preferred to the other or others of those relatives, regardless of sex: see s 26(3); and PARA 453 post. For the meaning of 'nearest relative' see PARA 453 post.

7 Ie within the meaning of the Children Act 1989 s 3: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 134.

8 Mental Health Act 1983 s 26(2) (amended by the Children Act 1989 (Consequential Amendment of Enactments) Order 1991, SI 1991/1881, art 3). The result is that the child is treated for these purposes not only as the legitimate child of his mother and of his father if the father has parental responsibility, but also as a relative of their relatives.

UPDATE

452 Meaning of 'relative'

TEXT AND NOTES 1-5--1983 Act s 26 further amended so as to include references to civil partners: Mental Health Act 2007 s 26.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(3) RELATIVES/453. Meaning of 'nearest relative'.

453. Meaning of 'nearest relative'.

For the purposes of the statutory provisions relating to compulsory admission and reception into guardianship¹, the 'nearest relative' of a patient² means, subject to certain exceptions³, the person first described in the list of relatives⁴ who is for the time being surviving⁵. Where a patient ordinarily resides with or is cared for by one or more of his relatives (or, if in hospital⁶, he last ordinarily resided with a relative or relatives), preference must be given to that relative or relatives over the other or others; as between two or more of such relatives, preference is given according to the list of relatives⁷. Where more than one relative of the same description is surviving, relatives of the whole blood must be preferred to relatives of the half-blood and the elder or eldest of two or more relatives must be preferred to the other or others, regardless of sex, in ascertaining who is the nearest relative⁸.

However, where the person so ascertained as the nearest relative: (1) is not ordinarily resident⁹ within the United Kingdom¹⁰, the Channel Islands or the Isle of Man¹¹; or (2) being the husband or wife¹² of the patient, is permanently separated from the patient, either by agreement or under a court order, or has deserted or been deserted by the patient for a period which has not come to an end¹³; or (3) not being the husband, wife, father or mother of the patient, is for the time being under 18 years of age¹⁴, then the nearest relative of the patient must be ascertained as if that person were dead¹⁶.

Where the patient is a child or young person and is in the care of a local authority by virtue of a care order within the meaning of the Children Act 1989¹⁷, that authority is deemed to be the nearest relative of the patient in preference to any other person except the patient's husband or wife, if any¹⁸.

Where a patient has not attained the age of 18 years¹⁹ and a guardian²⁰ has been appointed for him or a residence order²¹ is in force in relation to him, the guardian (or guardians) or person named in the residence order is deemed to be his nearest relative²² to the exclusion of any other person²³.

1 Ie for the purposes of the Mental Health Act 1983 Pt II (ss 2-34) (as amended) and such provisions of that Part as are applied to patients admitted under Pt III (ss 35-55) (as amended) by s 40(4), s 41(3) and Sch 1 (as amended): see PARAS 460 et seq, 487-489, 494, 496 post.

2 For the meaning of 'patient' see PARA 435 ante.

3 Ie subject to the Mental Health Act 1983 ss 26(4), 27-29 (as amended): see notes 7-23 infra; and PARAS 455-456 post.

4 See PARA 452 ante.

5 Mental Health Act 1983 s 26(3). As to the compatibility of these provisions with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) and the possible amendment of the Mental Health Act 1983 so as to allow a patient detained under the Act to apply to have the designated nearest relative replaced see *JT v United Kingdom (Application 26494/95)* [2000] 1 FLR 909, [2000] Fam Law 533, ECtHR; *R (on the application of M) v Secretary of State for Health* [2003] EWHC 1094 (Admin), [2003] 3 All ER 672n (declaration of incompatibility made in relation to a patient's inability to have the designated nearest relative replaced). See also *R (on the application of E) v Bristol City Council* [2005] EWHC 74 (Admin), [2005] All ER (D) 57 (Jan); and PARA 451 note 11 ante. As to the Convention for the Protection of Human Rights and Fundamental Freedoms and declarations of incompatibility see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

6 For the meaning of 'hospital' see PARA 417 ante.

7 Mental Health Act 1983 s 26(4). See *Re D (Mental Patient: Habeas Corpus)* [2001] 1 FCR 218, CA (if someone appears to be the nearest relative, there is no duty on a social worker to carry out further enquiries).

8 Mental Health Act 1983 s 26(3).

9 For a consideration of the meaning of the words 'ordinarily resident' see *Akbarali v Brent London Borough Council* [1983] 2 AC 309 at 342, sub nom *Shah v Barnet London Borough Council* [1983] 1 All ER 226 at 235, HL, per Lord Scarman (the phrase refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes). See also CONFLICT OF LAWS vol 8(3) (Reissue) PARA 58.

10 For the meaning of 'United Kingdom' see PARA 406 note 18 ante.

11 Mental Health Act 1983 s 26(5)(a).

12 'Husband' and 'wife' include a person who is living with the patient as the patient's husband or wife, as the case may be (or, if the patient is for the time being an in-patient in a hospital, was so living until the patient was admitted), and has been or had been so living for a period of not less than six months; but a person is not to be treated as a nearest relative for these purposes unless the husband or wife of the patient is disregarded by virtue of permanent separation, court order or desertion under *ibid* s 26(5)(b): s 26(6).

13 *Ibid* s 26(5)(b). As to the elements necessary to constitute desertion see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 362 et seq. If desertion is clearly established, it seems that the fact that it had commenced recently and that the period was consequently short would not matter for the purposes of displacing the deserting husband or wife as the nearest relative of the deserted spouse.

14 *Ibid* s 26(5)(c). Thus a husband, wife, father or mother, notwithstanding that they are under 18, may exercise the functions of the nearest relative in respect of a spouse or child. 'Under 18 years of age' means before the commencement of a person's eighteenth birthday: see the Family Law Reform Act 1969 s 9(1).

16 Mental Health Act 1983 s 26(5) (amended by the Children Act 1989 s 108(7), Sch 15).

17 'Care order' means an order under the Children Act 1989 s 31(1)(a) placing the child in the care of a designated local authority and includes (except where express provision to the contrary is made) an interim care order made under s 38: ss 31(11), 105(1). It also includes any order which by or under any enactment has the effect of or is deemed to be a care order for the purposes of the Children Act 1989: s 105(1). For the orders deemed to be care orders see s 108(6), Sch 14 paras 15, 16 (amended by the Courts and Legal Services Act 1990 ss 116, 125(7), Sch 16 para 33, Sch 20; the Armed Forces Act 1991 s 26(2), Sch 3; and the Children Act 1989 (Commencement and Transitional Provisions) Order 1991, SI 1991/828, art 4, Schedule).

18 Mental Health Act 1983 s 27 (substituted by the Children Act 1989 s 108(5), Sch 13 para 48(1)).

19 The age of 18 is attained at the commencement of a person's eighteenth birthday: see the Family Law Reform Act 1969 s 9(1).

20 *Ie* including a special guardian (within the meaning of the Children Act 1989) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 151 et seq) but not including a guardian under the Mental Health Act 1983 Pt II (as amended): s 28(3) (substituted by the Children Act 1989 Sch 13 para 48(2), (4); and amended by the Adoption and Children Act 2002 s 139(1), Sch 3 para 41).

21 'Residence order' means an order settling the arrangements to be made as to the person with whom a child is to live: Children Act 1989 s 8(1). See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 247 et seq.

22 However, the exclusions listed in the Mental Health Act 1983 s 26(5) (as amended) (see the text and notes 9-16 *supra*) apply to such a person: s 28(2). For example, if he was not ordinarily resident within the United Kingdom, he would not be deemed to be the nearest relative.

23 *Ibid* s 28(1) (substituted by the Children Act 1989 Sch 13 para 48(2), (3)).

UPDATE

453 Meaning of 'nearest relative'

TEXT AND NOTES 12-16, 18--1983 Act s 26 further amended, s 27 amended so as to include references to civil partners: Mental Health Act 2007 s 26.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(3) RELATIVES/454. Powers of the nearest relative.

454. Powers of the nearest relative.

An application for admission for assessment¹, an application for admission for treatment² and a guardianship application³ may be made either by the patient's⁴ nearest relative⁵ or by an approved social worker⁶. In any case of urgent necessity, an emergency application for admission for assessment⁷ may also be made either by the patient's nearest relative or by an approved social worker⁸.

The nearest relative (amongst others) may apply to a county court⁹ for an order that the statutory functions of the nearest relative be exercisable by the applicant or by any other person specified in the application¹⁰. If the person having the functions of the nearest relative by virtue of such an order dies, any relative, including the nearest relative, has the right to apply for discharge or variation of the order¹¹.

The nearest relative of a patient who is for the time being liable to be detained or subject to guardianship¹² may, by an order in writing¹³, discharge such a patient¹⁴. The nearest relative must give 72 hours' notice in writing to the managers¹⁵ of the hospital¹⁶ of his intention to order discharge¹⁷. The nearest relative also has the right, in prescribed circumstances¹⁸, to apply to a mental health review tribunal¹⁹. Where a minor who is a ward of court is liable to be detained²⁰, any power exercisable²¹ in relation to the patient by his nearest relative is exercisable by or with the leave of the court²².

1 Ie under the Mental Health Act 1983 s 2: see PARA 460 post. 'Application for admission for assessment' has the meaning given in s 2 (see PARA 460 post): s 145(1).

2 Ie under ibid s 3: see PARA 461 post. 'Application for admission for treatment' has the meaning given in s 3 (see PARA 461 post): s 145(1).

3 Ie under ibid s 7(2): see PARA 469 post.

4 For the meaning of 'patient' see PARA 435 ante.

5 For the meaning of 'nearest relative' see PARA 453 ante.

6 For the meaning of 'approved social worker' see PARA 427 ante. As to the duties of an approved social worker in making such applications (including the duty to consult the patient's nearest relative), the nearest relative's power to object to an application for admission for treatment, and the nearest relative's right to request consideration of a case by an approved social worker see PARA 451 ante.

7 Ie under the Mental Health Act 1983 s 4(1): see PARA 462 post.

8 Ibid s 4(2).

9 As to county courts generally see COURTS vol 10 (Reissue) PARA 701 et seq.

10 See the Mental Health Act 1983 s 29(1)-(3); and PARA 456 post.

11 See ibid s 30(3). The functions of the nearest relative are meanwhile in abeyance: see s 30(3)(b).

12 Ie under the Mental Health Act 1983 Pt II (ss 2-34) (as amended): s 23(1). This provision does not apply to patients liable to be detained or under guardianship by virtue of orders or directions under Pt III (ss 35-55) (as amended): cf s 40(4), s 41(3), Sch 1 (as amended).

13 There are forms which may be used by the nearest relative: Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 15(1), (2), Sch 1 Forms 34, 35. As to the manner in which the order must be served see reg 3(3); and PARA 448 ante.

14 Mental Health Act 1983 s 23(2).

15 For the meaning of 'managers' see PARA 439 ante.

16 For the meaning of 'hospital' see PARA 417 ante.

17 Mental Health Act 1983 s 25(1). The order will have no effect if in the meantime the responsible medical officer has reported to the managers that, in his opinion, the patient, if discharged, would be likely to act in manner dangerous to other persons or himself: s 25(1). See PARA 525 post.

18 These include a case where he has been debarred from discharging the patient in the circumstances set out in note 17 supra: *ibid* s 66(1)(g).

19 See PARA 564 post.

20 *Ie* by virtue of an application for admission under the Mental Health Act 1983 Pt II (as amended). As to wards of court generally see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 218 et seq.

21 *Ie* under *ibid* Pt II (as amended) or s 66 (as amended).

22 *Ibid* s 33(2).

UPDATE

454 Powers of the nearest relative

TEXT AND NOTES 6, 8--References to an approved social worker now to an approved mental health professional: Mental Health Act 1983 s 4(2) (amended by Mental Health Act 2007 Sch 2 para 2(a)).

NOTE 13--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(3) RELATIVES/455. Delegation of functions by nearest relative.

455. Delegation of functions by nearest relative.

The nearest relative¹ of a patient² may authorise in writing any other person, except the patient himself or a person disqualified from being the nearest relative³, to perform in respect of the patient the statutory functions conferred on the nearest relative⁴, and may revoke any such authority⁵. On making or revoking such an authority, the nearest relative must forthwith give the authority⁶ or written notice of the revocation⁷ to the person authorised, the managers⁸ of the hospital in the case of a patient liable to be detained there, and the responsible local social services authority⁹ and the private guardian, if any, in the case of a patient subject to guardianship¹⁰. A person for the time being so authorised to exercise the functions of the nearest relative must exercise them on behalf of such a relative¹¹.

1 For the meaning of 'nearest relative' see PARA 453 ante.

2 For the meaning of 'patient' see PARA 435 ante.

3 I.e. a person mentioned in the Mental Health Act 1983 s 26(5) (as amended): see PARA 453 ante.

4 I.e. by or under *ibid* Pt II (ss 2-34) (as amended): see PARA 454 ante.

5 *Ibid* s 32(2)(e); Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 14(1).

6 The authority so given takes effect on receipt of it by the person authorised: *ibid* reg 14(3).

7 The revocation takes effect on receipt of a notice of revocation by the person authorised: *ibid* reg 14(3).

8 For the meaning of 'managers' see PARA 439 ante.

9 For the meaning of 'local social services authority' see PARA 424 ante.

10 Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 14(2).

11 *Ibid* reg 14(4).

UPDATE

455 Delegation of functions by nearest relative

NOTES 5, 10--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(3) RELATIVES/456. Appointment by the county court of an acting nearest relative.

456. Appointment by the county court of an acting nearest relative.

On application¹, the county court² may by order³ direct that the statutory functions of the nearest relative of a patient⁴ are to be exercisable, during the continuance in force of the order⁵, by the applicant⁶ or by any other person specified in the application, being a person who, in the court's opinion, is a proper person to act as the patient's nearest relative and is willing to do so⁷.

The order may be made on the application of: (1) any relative⁸ of the patient; (2) any other person with whom the patient is residing or, if he is an in-patient in a hospital, was last residing before admission; or (3) an approved social worker⁹. The order may be made upon any of the following grounds: (a) that the patient has no nearest relative¹⁰, or that it is not reasonably practicable to ascertain whether he has such a relative, or who that relative is¹¹; (b) that the patient's nearest relative is incapable of acting as such by reason of mental disorder or other illness¹²; (c) that the patient's nearest relative unreasonably objects¹³ to the making of an application for admission for treatment¹⁴ or a guardianship application¹⁵ in respect of the patient¹⁶; or (d) that the patient's nearest relative has exercised, without due regard¹⁷ to the patient's welfare or the interests of the public, his power to discharge the patient from hospital or guardianship¹⁸ or is likely to do so¹⁹. An order made under head (a) or head (b) above may specify a period for which it is to continue in force unless previously discharged²⁰.

If, immediately before the expiration of the 28 day period during which a patient may be detained for assessment²¹, an application to the county court is pending²² on any of the grounds set out in head (c) or head (d) above, that period must be extended in any case until the application has been finally disposed of²³, and, if an order is made by the county court, for a further seven days²⁴.

Where the functions of the nearest relative are exercisable by another person by virtue of a county court order, the nearest relative has the right, if the patient is or subsequently becomes liable to be detained or subject to guardianship²⁵, to apply to a mental health review tribunal in respect of the patient within the period of 12 months beginning with the date of the order and in any subsequent period of 12 months during which the order continues in force²⁶.

1 As to the procedure on such applications see PARA 459 post.

2 As to county courts generally see COURTS vol 10 (Reissue) PARA 701 et seq.

3 Although the county court has jurisdiction to make an interim order under the Mental Health Act 1983 s 29, in general a final order ought to be made before the making of an application under s 3 (see PARA 461 post): *R v Central London County Court, ex p London* [1999] 3 All ER 991, CA.

4 I.e. under the Mental Health Act 1983 Pt II (ss 2-34) (as amended) and ss 66, 69 (as amended): see PARAS 454 ante, 564 post. For the meaning of 'nearest relative' see PARA 453 ante. For the meaning of 'patient' see PARA 435 ante.

5 While such an order is in force, the provisions of *ibid* Pt II (as amended) (other than the power to appoint an acting nearest relative and the power to discharge and vary such orders (see ss 29, 30; and PARAS 456-457 post) apply in relation to the patient as if for any reference to the nearest relative there were substituted a reference to the person having the functions of that relative and, without prejudice to the power to discharge and vary such orders, so apply notwithstanding that the person who was the patient's nearest relative when the order was made is no longer his nearest relative: s 29(6). As to the duration of such orders see PARA 458 post.

6 If the applicant is an approved social worker (see PARA 427 ante), the local social services authority (see PARA 424 ante) and not the approved social worker will be empowered by the order to exercise the functions of the nearest relative: *ibid* s 29(2).

7 *Ibid* s 29(1). See *Lewis v Gibson* [2005] EWCA Civ 587, [2005] 2 FCR 241 (in all the circumstances the judge had been entitled to confirm an interim order displacing the claimant as nearest relative to her daughter, who suffered from Down's syndrome). The court must be satisfied as to the statutory criteria both at the date of the application and at the date of the hearing and there is nothing to stop the court from proceeding to consider any issue of 'best interests' within the same application: the patient can be served with the proceedings and notified of the right to be joined even though technically it is not required (see CPR Sch 2 CCR Ord 49 r 12(3); and PARA 459 post). The judge should at the earliest opportunity make enquiries as to whether the patient's rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) have been protected. See *R (on the application of M) v Secretary of State for Health* [2003] EWHC 1094 (Admin), [2003] 3 All ER 672n (declaration of incompatibility made in relation to a patient's inability to have the designated nearest relative replaced). As to the Convention for the Protection of Human Rights and Fundamental Freedoms and declarations of incompatibility see CONSTITUTIONAL LAW AND HUMAN RIGHTS. See also PARA 453 note 5 ante.

8 For the meaning of 'relative' see PARA 452 ante.

9 Mental Health Act 1983 s 29(2). As to approved social workers see PARAS 427, 450-451 ante.

10 *Ie* within the meaning of the Mental Health Act 1983: see PARA 453 ante.

11 *Ibid* s 29(3)(a).

12 *Ibid* s 29(3)(b). For the meaning of 'mental disorder' see PARA 402 ante.

13 The test is not what the relative subjectively considers reasonable but what a reasonable relative would do in the particular circumstances, akin to that laid down for dispensing with parental agreement to adoption on the ground that it is unreasonably withheld in *Re W (An Infant)* [1971] AC 682, [1971] 2 All ER 49, HL: see *W v L* [1974] QB 711, [1973] 3 All ER 884, CA.

14 The objection of the nearest relative to an application for the admission of the patient to hospital for treatment (but not for assessment) or a guardianship application will prevent an approved social worker from making such an application: see the Mental Health Act 1983 s 11(4); and PARA 451 ante.

15 See note 13 *supra*.

16 Mental Health Act 1983 s 29(3)(c). See *Lewis v Gibson* [2005] EWCA Civ 587, [2005] 2 FCR 241; and note 7 *supra*.

17 As to the objective test in relation to 'without due regard' see *Surrey County Council Social Services v McMurray* (11 November 1994) Lexis, CA.

18 As to such orders for discharge see PARA 523 post.

19 Mental Health Act 1983 s 29(3)(d). However, such an order will be of no effect if the responsible medical officer (see PARA 506 note 1 post) is prepared to certify to the managers (see PARA 439 ante) that the patient would be likely, if discharged, to act in a manner dangerous to other persons or to himself: see s 25; and PARA 525 post.

20 *Ie* under *ibid* s 30 (see PARA 457 post): s 29(5).

21 As to detention for assessment see PARA 460 post.

22 See note 23 *infra*.

23 An application will be deemed to have been finally disposed of at the expiration of the time allowed for appealing from the decision of the county court or, if notice of appeal has been given within that time, when the appeal has been heard or withdrawn; and 'pending' must be construed accordingly: Mental Health Act 1983 s 29(4). As to the time within which notice of appeal must be served see CIVIL PROCEDURE vol 12 (2009) PARA 1684.

See *R (on the application of MH) v Secretary of State for Health* [2005] UKHL 60, [2005] All ER (D) 218 (Oct), where the House of Lords overruled the Court of Appeal (see [2004] EWCA Civ 1609, [2005] 3 All ER 468) and maintained that the Mental Health Act 1983 ss 2, 29(4) are not incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 5(4) (which states that detained persons are entitled to take proceedings by which the lawfulness of their detention will be decided speedily by a court and their release ordered if the detention is not lawful) (see

CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 127, 132). The Mental Health Act 1983 s 2 (see PARA 460 post) was held not to be incompatible as the Convention art 5(4) did not require that every case be considered by a court, rather that the person detained should have the right to 'take proceedings': although the argument that such a right was ineffective if the patient lacked the ability to bring the proceedings was powerful it did not lead to the conclusion that the Mental Health Act 1983 s 2 was itself incompatible with the Convention or that the solution was to require a reference in every case, rather that every sensible effort should be made to enable the patient to exercise that right if there was reason to think that he would wish to do so. The Mental Health Act 1983 s 29(4) was held not to be incompatible although the inaction or inaction of the authorities under it might be so. As to mental health review tribunals see PARA 560 et seq post.

24 Ibid s 29(4).

25 As to compulsory admission to hospital or guardianship see PARA 460 et seq post.

26 Mental Health Act 1983 s 66(1)(h), (ii), (2)(g). See PARA 564 post.

UPDATE

456 Appointment by the county court of an acting nearest relative

TEXT AND NOTE 7--If the court decides to make an order on an application under the Mental Health Act 1983 s 29(1), the rules set out in s 29(1A) (added by Mental Health Act 2007 s 23(3)) have effect for the purposes of specifying a person in the order.

TEXT AND NOTES 8, 9--Now, head (3) an approved mental health professional; and new head (4) the patient: Mental Health Act 1983 s 29(2) (amended by Mental Health Act 2007 s 23(4), Sch 2 para 7(c)).

TEXT AND NOTES 10-19--In head (d) words 'from hospital or guardianship' omitted; and new head (e) that the patient's nearest relative is otherwise not a suitable person to act as such: Mental Health Act 1983 s 29(3)(d), (e) (s 29(3)(d) amended, s 29(3)(e) added, by Mental Health Act 2007 s 23(5), Sch 3 para 13).

NOTE 20--Mental Health Act 1983 s 29(5) amended: Mental Health Act 2007 s 23(6).

NOTE 23--*R (on the application of MH)*, cited, reported sub nom *R (on the application of H) v Secretary of State for Health* [2006] 1 AC 441.

NOTE 26--Mental Health Act 1983 s 66(1)(h) amended: Mental Health Act 2007 s 25.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(3) RELATIVES/457. Discharge and variation of county court orders.

457. Discharge and variation of county court orders.

An order appointing an acting nearest relative made¹ in respect of a patient² by the county court³ may be discharged by that court on the application⁴ of the person having the functions of the nearest relative by virtue of the order⁵.

Where the order was made on the ground that the patient had no nearest relative or that it was not reasonably practicable to ascertain whether he had such a relative, or who that relative was⁶, the order may be discharged on the application of a person who is in fact the nearest relative⁷. Where the order was made on the ground that the nearest relative of the patient was incapable of acting by reason of mental disorder or other illness⁸, the order may be discharged on the application of that relative⁹. Where an order is made on these grounds it may specify a period during which it is to remain in force unless previously discharged¹⁰. Where the person whose functions as the nearest relative were made exercisable by another person but that person has since died or ceased to be the nearest relative¹¹, the order may be discharged on the application of the person who has thereupon become the nearest relative¹².

An order appointing an acting nearest relative made in respect of a patient by the county court may be varied by that court, on the application of the person having the functions of the nearest relative by virtue of the order or on the application of an approved social worker¹³, by substituting for the person having the functions of the nearest relative a local social services authority¹⁴ or any other person who in the court's opinion is a proper person to exercise those functions, being an authority or person who is willing to do so¹⁵.

In the event of the death of the person having the functions of the nearest relative by virtue of the order, the order may be discharged or varied on the application of any relative¹⁶ of the patient and not only of the nearest relative¹⁷. Until an order is discharged or varied in these circumstances, the functions of the nearest relative are not exercisable by any person¹⁸.

The discharge or variation of such an order does not affect the validity of anything previously done in pursuance of the order¹⁹.

1 Ie under the Mental Health Act 1983 s 29: see PARA 456 ante. For the meaning of 'nearest relative' see PARA 453 ante.

2 For the meaning of 'patient' see PARA 435 ante.

3 As to county courts generally see COURTS vol 10 (Reissue) PARA 701 et seq.

4 For the procedure on such applications see PARA 459 post.

5 Mental Health Act 1983 s 30(1)(a). If the order is discharged, the nearest relative from whom his functions were transferred by the order will again be able to exercise them.

6 Ie on the ground specified in *ibid* s 29(3)(a): see PARA 456 ante.

7 *Ibid* s 30(1)(b). A person whose address or identity were unknown when the order was made will thus be able, if the order is discharged, to exercise the functions of the nearest relative.

8 Ie on the ground specified in *ibid* s 29(3)(b): see PARA 456 ante. For the meaning of 'mental disorder' see PARA 402 ante.

9 *Ibid* s 30(1)(b).

10 See PARA 456 ante.

- 11 He may have ceased to be the nearest relative by reason of another taking precedence over him in the list of relatives specified in the Mental Health Act 1983 s 26(1): see PARAS 452-453 ante. Eg the patient may have married, in which case the spouse would take precedence over other relatives as nearest relative; or a child of the patient may have attained the age of 18 with a similar result.
- 12 See *ibid* s 30(1)(b).
- 13 For the meaning of 'approved social worker' see PARA 427 ante.
- 14 As to local social services authorities see PARA 424 et seq ante.
- 15 Mental Health Act 1983 s 30(2).
- 16 For the meaning of 'relative' see PARA 452 ante.
- 17 Mental Health Act 1983 s 30(3).
- 18 *Ibid* s 30(3). The nearest relative will not therefore be able to resume the functions transferred from him when the acting nearest relative dies; he can only do so if the order is discharged on the application of himself or any other relative.
- 19 *Ibid* s 30(5).

UPDATE

457 Discharge and variation of county court orders

TEXT AND NOTES--The patient also may apply to discharge or vary an order appointing an acting nearest relative; and a nearest relative displaced on the ground that he is unsuitable to act as such (see PARA 456) may, with leave of the court, apply for the discharge of the order which displaced him: Mental Health Act 1983 s 30(1), (1A), (2), (4), (4A) (s 30(1), (2), (4), amended, s 30(1A), (4A) added, by Mental Health Act 2007 s 24(2)-(4), (6), Sch 3 para 14). The court may make an appointment for an indefinite period: see Mental Health Act 1983 s 30(4B) (added by Mental Health Act 2007 s 24(7)). If the court decides to vary an order on an application under the Mental Health Act 1983 s 30(2), the rules in s 30(2A) have effect for the purposes of substituting another person: s 30(2A) (added by Mental Health Act 2007 s 24(5)).

TEXT AND NOTE 13--Reference to an approved social worker now to an approved mental health professional: Mental Health Act 1983 s 30(2) (amended by Mental Health Act 2007 Sch 2 para 7(d)).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(3) RELATIVES/458. Duration of county court orders.

458. Duration of county court orders.

Unless previously discharged¹, an order made in respect of a patient² that the functions of the nearest relative be exercisable by another person³ will cease to have effect: (1) if the patient was on the date of the order liable to be detained in pursuance of an application for admission for treatment⁴ or by virtue of an order or direction under Part III of the Mental Health Act 1983⁵ or subject to guardianship⁶ or becomes so liable or subject within the period of three months beginning with the date of the order, when he ceases to be so liable or subject⁷; or (2) if the patient was not on the date of the order so liable or subject and does not become so within that period of three months, at the expiration of that period⁸.

1 This includes discharge by the expiration of a duration specified for the order under the Mental Health Act 1983 s 29(5) (see PARA 456 ante).

2 For the meaning of 'patient' see PARA 435 ante.

3 Ie under the Mental Health Act 1983 s 29: see PARA 456 ante.

4 See ibid s 3; and PARA 461 post.

5 Ie excluding ibid ss 35, 36 (remands to hospital for report or for treatment: see PARA 489 post) and s 38 (as amended) (interim hospital orders: see PARA 491 post). As to Pt III (ss 35-55) (as amended) see PARAS 486-505, 535-541 post.

6 Ie under ibid s 7 or by virtue of an order or direction under Pt III (as amended): see PARAS 469, 502 post.

7 Ibid s 30(4)(a). However, if the patient is transferred from hospital to guardianship or vice versa in pursuance of regulations made under s 19 (as amended) (see PARA 511 post), the order will continue in force.

8 Ibid s 30(4)(b).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(3) RELATIVES/459. Procedure on applications to the county court.

459. Procedure on applications to the county court.

An application to a county court¹ under Part II of the Mental Health Act 1983² must be made by a claim form filed in the court for the district in which the patient's place of residence³ is situated or, in the case of an application⁴ for the discharge or variation of an order⁵ appointing an acting nearest relative, in that court or in the court which made the order⁶. Where an application is made⁷ for an order that the functions of the nearest relative be exercisable by some other person, the nearest relative must be made a respondent to the application unless the application is made on the ground that there is no nearest relative or that it is not reasonably practicable to ascertain whether there is such a relative or who that relative is⁸, or the court otherwise orders; and the court may order that any other person, who is not the patient, be made a respondent⁹.

Unless otherwise ordered, an application under Part II of the Mental Health Act 1983 must be heard and determined by the court sitting in private¹⁰. On the hearing of the application the court may accept as evidence of the facts stated in it any report made by a medical practitioner and any report made in the course of his official duties by: (1) a probation officer; (2) an officer of a local authority or of a voluntary organisation exercising statutory functions on behalf of a local authority; or (3) an officer of a hospital authority¹¹. However, the respondent must be told the substance of any part of such report bearing on his fitness or conduct which the judge considers to be material for the fair determination of the application¹². For the purpose of determining the application the judge may interview the patient, either in the presence of or separately from the parties and either at the court or elsewhere, or may direct the district judge¹³ to interview the patient and report to the judge in writing¹⁴.

1 As to county courts generally see COURTS vol 10 (Reissue) PARA 701 et seq.

2 Ie under the Mental Health Act 1983 Pt II (ss 2-34) (as amended).

3 'Place of residence' means, in relation to a patient who is receiving treatment as an in-patient in a hospital or other institution, that hospital or institution: CPR Sch 2 CCR Ord 49 r 12(1).

4 Ie made under the Mental Health Act 1983 s 30 (see PARA 457 ante).

5 Ie made under ibid s 29 (see PARA 456 ante).

6 CPR Sch 2 CCR Ord 49 r 12(2).

7 Ie made under the Mental Health Act 1983 s 29 (see PARA 456 ante).

8 Ie the ground set out in ibid s 29(3)(a) (see PARA 456 ante).

9 CPR Sch 2 CCR Ord 49 r 12(3). See PARA 456 note 7 ante.

10 Mental Health Act 1983 s 31(a); CPR Sch 2 CCR Ord 49 r 12(5). Publication of information relating to the proceedings in chambers is contempt of court: see the Administration of Justice Act 1960 s 12(1)(b), (3) (prospectively amended); and CONTEMPT OF COURT vol 9(1) (Reissue) PARAS 430-431.

11 CPR Sch 2 CCR Ord 49 r 12(4). 'Hospital authority' means the managers of a hospital as defined in the Mental Health Act 1983 s 145(1) (see PARA 439 ante): CPR Sch 2 CCR Ord 49 r 12(1). County court rules may provide for the admission on the hearing of such applications of evidence of such descriptions as may be specified notwithstanding anything to the contrary in any enactment or rule of law relating to the admissibility of evidence: Mental Health Act 1983 s 31(b).

12 CPR Sch 2 CCR Ord 49 r 12(4) proviso. In order to comply with the proviso, it is sufficient if the report is handed to the respondent's legal adviser in circumstances where the legal adviser can give advice and take instructions: *B v B* [1979] 3 All ER 494, sub nom *B (A) v B (L)* [1980] 1 WLR 116, CA. Where applications are made in guardianship proceedings, and those applications involve the nearest relative, the nearest relative should have access to the information on which the court's decision will be based: *R (on the application of Stevens) v Plymouth City Council* [2002] EWCA Civ 388, [2002] 1 WLR 2583, [2002] 1 FLR 1177.

13 County court registrars became district judges by virtue of the Courts and Legal Services Act 1990 s 74(1)(a); references to the office of county court registrar are to be construed as references to the office of district judge: s 74(3).

14 CPR Sch 2 CCR Ord 49 r 12(6). County court rules may provide for the visiting and interviewing of patients in private by or under the directions of the court: Mental Health Act 1983 s 31(c).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(4) HOSPITAL ADMISSIONS/460. Compulsory admission for assessment.

(4) HOSPITAL ADMISSIONS

460. Compulsory admission for assessment.

A patient¹ may be admitted to a hospital², and there detained for the period allowed³, in pursuance of an application for admission for assessment⁴. The patient may apply to a mental health review tribunal within the period of 14 days beginning with the day of his admission⁵.

An application for admission for assessment may be made⁶ in respect of a patient on the grounds: (1) that he is suffering from mental disorder⁷ of a nature or degree which warrants his detention in a hospital for assessment, or assessment followed by medical treatment⁸, for at least a limited period⁹; and (2) that he ought to be so detained in the interests of his own health or safety or with a view to the protection of other persons¹⁰. Every application must be founded on the written recommendations¹¹ in the prescribed form¹² of two registered medical practitioners¹³, including in each case a statement that in the opinion of the practitioner the conditions set out under heads (1) and (2) above are complied with¹⁴.

The maximum period¹⁵ for which a patient so admitted to hospital for assessment may be detained is 28 days, beginning with the day of admission¹⁶; and he must not be detained after that period unless, before its expiration, he has become liable to be detained by virtue of any subsequent application¹⁷, order¹⁸ or direction¹⁹ which may have been made²⁰.

1 For the meaning of 'patient' generally see PARA 435 ante.

2 For the meaning of 'hospital', which for this purpose includes a registered establishment, see PARA 417 ante. For the meaning of 'registered establishment' see PARA 421 ante.

3 As to the maximum duration of detention see the Mental Health Act 1983 s 2(4); and note 16 infra.

4 Ibid s 2(1). As to the forms of application see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 4(1)(a), Sch 1 Forms 1, 2 (Form 2 substituted by SI 1996/540). Where a patient has been admitted pursuant to an application under the Mental Health Act 1983 s 2, a record of admission must be made by the managers of the hospital (as to whom see PARA 439 ante) and attached to the application: Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 4(3), Sch 1 Form 14 (substituted by SI 1996/540). As to bilingual application forms to be used in Wales see the Mental Health (Hospital and Guardianship) (Welsh Forms) Regulations 1971, SI 1971/178, reg 3, Schedule. Application may be made in respect of an informal in-patient: see PARA 463 post.

As to the criteria for detention of persons of unsound mind under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) see *Winterwerp v Netherlands* (1981) 4 EHRR 228, ECtHR. See also *Kolanis v United Kingdom (Application 517/02)* [2005] All ER (D) 227 (Jun), ECtHR. As to the Convention see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 123 et seq. As to the informal detention of patients who are not capable of consenting to detention see *R v Bournewood Community and Mental Health NHS Trust, ex p L* [1999] 1 AC 458, [1998] 3 All ER 289, HL; *HL v United Kingdom (Application 45508/99)* (2004) 81 BMLR 131, (2004) Times, 19 October, ECtHR; and PARA 437 note 7 ante. See also PARA 663 post.

The Code of Practice (1999) PARA 2.1 et seq gives general guidance on the assessment by approved social workers and doctors of the needs of a person with mental health problems, where it may lead to an application for admission under the Mental Health Act 1983. For guidance on the choice between admission for assessment under the Mental Health Act 1983 s 2 or admission for treatment under s 3 (see PARA 461 post) see Code of Practice (1999) PARAS 5.1-5.5. As to the Mental Health Act 1983 s 2 see also *R (on the application of MH) v Secretary of State for Health* [2005] UKHL 60, [2005] All ER (D) 218 (Oct); and PARA 456 note 23 ante. As to the Code of Practice see PARA 436 ante.

5 See the Mental Health Act 1983 s 66(1)(a), (i), (2)(a); and PARA 564 head (1) post.

6 Applications may be made either by the nearest relative of the patient (see PARA 453 ante) or by an approved social worker (see PARA 427 ante): *ibid* s 11(1). As to applications by approved social workers see PARA 451 ante. For general requirements for applications for admission see PARA 480 post.

7 For the meaning of 'mental disorder' see PARA 402 ante.

8 As to the meaning of 'medical treatment' see PARA 552 post. As to the treatment which may be given to the patient while detained for assessment see PARAS 551, 553 et seq post.

The detention must be related to the mental disorder of the person being detained, so where a pregnant woman, who was suffering from depression, was detained in order to carry out an enforced Caesarean section, that detention was unlawful: *St George's Healthcare NHS Trust v S, R v Collins, ex p S* [1998] 3 All ER 673, CA.

9 Mental Health Act 1983 s 2(2)(a).

10 *Ibid* s 2(2)(b).

11 As to medical recommendations see PARA 482 post.

12 See the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 4(1)(b), Sch 1 Forms 3, 4 (substituted by SI 1996/540). The recommendations may be joint in form: Mental Health Act 1983 s 11(7).

13 'Registered medical practitioner' means a fully registered person within the meaning of the Medical Act 1983 (see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 4): see the Interpretation Act 1978 s 5, Sch 1 (amended by the Medical Act 1983 s 56(1), Sch 5 para 18). As from a day to be appointed, the definition is substituted so as to refer to a fully registered person within the meaning of the Medical Act 1983 who holds a licence to practise under that Act: Interpretation Act 1978 Sch 1 (definition substituted by the Medical Act 1983 (Amendment) Order 2002, SI 2002/3135, art 16(1), Sch 1 Pt I para 10). At the date at which this volume states the law no such day had been appointed.

14 Mental Health Act 1983 s 2(3).

15 As to the power to order a patient's discharge during that time see *ibid* s 23 (as amended); and PARA 523 post.

16 *Ibid* s 2(4). However, where immediately before the expiration of that period an application has been made to the county court for an order transferring the functions of the nearest relative, that period must be extended until the application is finally disposed of, and, if the application is granted, for a further seven days: ss 2(4), 29(3)(c), (d), (4). As to the power of the county court to make such orders see PARA 456 ante.

17 *Ie* an application for admission for treatment under *ibid* s 3(1): see PARA 461 post. It will, of course, be possible for a patient who is not unwilling to do so to remain in hospital as an informal patient (see PARA 437 ante) after being detained for assessment.

18 *Ie* a hospital order made by a court having criminal jurisdiction: see *ibid* ss 37, 40 (as amended); and PARA 491 post. It seems unlikely that many patients will, while detained for assessment, become the subject of a hospital order. Cf the power of magistrates to remand to hospital for report under s 35 (see PARA 489 post) or to remand for medical examination under the Powers of Criminal Courts (Sentencing) Act 2000 s 11 (see MAGISTRATES vol 29(2) (Reissue) PARA 723).

19 See the Mental Health Act 1983 ss 47, 48, 51 (as amended) (empowering the Secretary of State by warrant to direct the removal of a prisoner to hospital); and PARAS 535-541 post. As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

20 *Ibid* s 2(4). There is no common law power to detain once the statutory period has expired: *B v Forsey* 1988 SLT 572, HL.

UPDATE

460-463 Compulsory admission for assessment ... Compulsory admission and temporary detention of in-patients

SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

460 Compulsory admission for assessment

NOTE 4--See *R (on the application of Marsh) v Secretary of State for the Home Department* [2007] EWHC 1028 (Admin), [2007] 1 WLR 2239; and *R (on the application of Rayner) v Secretary of State for Justice* [2008] EWCA Civ 176, [2009] 1 WLR 310.

NOTE 13--Appointed day is 16 November 2009: London Gazette, 21 August 2009.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(4) HOSPITAL ADMISSIONS/461. Compulsory admission for treatment.

461. Compulsory admission for treatment.

A patient¹ may be admitted to a hospital², and there detained for the period allowed³, in pursuance of an application for admission for treatment⁴. The patient may apply to a mental health review tribunal within the period of six months beginning with the day of his admission⁵.

An application for admission for treatment may be made⁶ in respect of a patient on the grounds: (1) that the patient is suffering from mental illness⁷, severe mental impairment, psychopathic disorder or mental impairment⁸, and his mental disorder⁹ is of a nature or degree which makes it appropriate for him to receive medical treatment¹⁰ in hospital¹¹; and (2) in the case of psychopathic disorder or mental impairment, that such treatment is likely to alleviate or prevent a deterioration of his condition¹²; and (3) that it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment¹³ and that it cannot be provided unless he is detained¹⁴.

Every application must be founded on the written recommendations¹⁵ in the prescribed form¹⁶ of two registered medical practitioners¹⁷, including in each case a statement that in the opinion of the practitioner the conditions set out under heads (1), (2) and (3) above are complied with¹⁸. Each recommendation must include prescribed particulars¹⁹ of the grounds for that opinion so far as it relates to the conditions under heads (1) and (2) above; and also a statement of the reasons for that opinion so far as it relates to the conditions under head (3) above, specifying whether other methods of dealing with the patient are available, and if so why they are not appropriate²⁰.

The application, and any recommendation given for its purposes, may describe the patient as suffering from more than one of the forms of mental disorder for which compulsory admission for treatment is possible²¹; but the application is of no effect unless the patient is described in each of the recommendations as suffering from the same one of those forms of mental disorder, whether or not he is also described in either of the recommendations as suffering from another of those forms²².

1 For the meaning of 'patient' generally see PARA 435 ante.

2 For the meaning of 'hospital', which for this purpose includes a registered establishment, see PARA 417 ante. For the meaning of 'registered establishment' see PARA 421 ante.

3 The period allowed in the first instance is a period not exceeding six months beginning with the day of admission (see the Mental Health Act 1983 s 20(1)), but the authority for detention may be renewed at the expiration of that period for a further period of six months, and thereafter for one year at a time (see s 20(2)). See PARAS 518, 521 post. As to the power to order discharge see s 23 (as amended); and PARA 523 post.

4 Ibid s 3(1). As to the forms of application see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 4(1)(e), Sch 1 Forms 8, 9 (substituted by SI 1996/540). A record of admission must be made by the managers and attached to the application: see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 4(3), Sch 1 Form 14 (substituted by SI 1996/540). As to bilingual application forms to be used in Wales see the Mental Health (Hospital and Guardianship) (Welsh Forms) Regulations 1971, SI 1971/178, reg 3, Schedule. An application may be made even though the patient is already in hospital informally or liable to be detained in pursuance of an application for admission for assessment: see the Mental Health Act 1983 s 5(1); and PARA 463 post. For the meaning of 'managers' see PARA 439 ante.

For general guidance on the assessment of patients see Code of Practice (1999) PARA 2.1 et seq; and for guidance on the choice between admission for treatment under the Mental Health Act 1983 s 3 and admission

for assessment under s 2 (see PARA 460 ante) see Code of Practice (1999) PARAS 5.1-5.5. As to the Code of Practice see PARA 436 ante.

Where a patient has been unlawfully detained as a result of a failure to comply with the relevant statutory requirements, an application for a writ of habeas corpus is an appropriate remedy for the patient: *Re S-C (Mental Patient: Habeas Corpus)* [1996] 1 All ER 532, [1996] 2 FCR 692, CA. See also *Barker v Barking, Havering and Brentwood Community Healthcare NHS Trust (Warley Hospital)* [1999] 1 FLR 106, (1998) 47 BMLR 112, CA.

5 See the Mental Health Act 1983 s 66(1)(b), (i), (2)(b); and PARA 564 post.

An order by a mental health review tribunal discharging a patient's detention is not a bar to a subsequent detention under s 3: *R v Managers of South Western Hospital, ex p M* [1993] QB 683, [1994] 1 All ER 161; *R v North West London Mental Health NHS Trust, ex p Stewart* [1998] QB 628, [1997] 4 All ER 871, CA. See also *R (on the application of Von Brandenburg (aka Hanley)) v East London and the City Mental Health Trust* [2003] UKHL 58, [2004] 1 All ER 400 (application for compulsory admission for assessment and treatment made by approved social worker who had significant information not before tribunal).

6 Applications may be made either by the nearest relative of the patient (see PARA 453 ante) or by an approved social worker (see PARA 427 ante): Mental Health Act 1983 s 11(1). As to applications by approved social workers see PARA 451 ante; and for general requirements as to applications for admission see PARA 480 post.

7 There is no statutory definition of 'mental illness', but see *W v L* [1974] QB 711, [1973] 3 All ER 884, CA; and PARA 402 ante.

8 For the meanings of 'severe mental impairment', 'mental impairment' and 'psychopathic disorder' see PARA 403 ante.

9 For the meaning of 'mental disorder' see PARA 402 ante.

10 As to the meaning of 'medical treatment' see PARA 552 post. As to the treatment which may be given in hospital see PARAS 551, 553 et seq post. As to 'nature' or 'degree' see *R v Mental Health Review Tribunal for the South Thames Region, ex p Smith* (1998) 47 BMLR 104.

11 Mental Health Act 1983 s 3(2)(a).

12 Ie the 'treatability' test: ibid s 3(2)(b). See *Reid v Secretary of State for Scotland* [1999] 2 AC 512, [1999] 1 All ER 481, HL; *R v Canons Park Mental Health Review Tribunal, ex p A* [1995] QB 60, [1994] 2 All ER 659, CA.

13 Admission for treatment is restricted to treatment in a hospital as an in-patient: *R v Gardner, ex p L, R v Hallstrom, ex p W* [1986] QB 1090, sub nom *R v Hallstrom, ex p W (No 2)* [1986] 2 All ER 306. This was confirmed in *Barker v Barking, Havering and Brentwood Community Healthcare NHS Trust (Warley Hospital)* [1999] 1 FLR 106, (1998) 47 BMLR 112, CA.

14 Mental Health Act 1983 s 3(2)(c). As to the criteria for detention of persons of unsound mind under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) see *Winterwerp v Netherlands* (1981) 4 EHRR 228, ECtHR. See also *Kolanis v United Kingdom (Application 517/02)* [2005] All ER (D) 227 (Jun), ECtHR. As to the Convention for the Protection of Human Rights and Fundamental Freedoms and the protection of the public see *Ashingdane v United Kingdom* (1985) 7 EHRR 528, ECtHR; *Litwa v Poland (Application 26629/95)* (2000) 63 BMLR 199, ECtHR. See also *Aerts v Belgium* (1998) 29 EHRR 50, ECtHR (conditions of detention under the Convention for the Protection of Human Rights and Fundamental Freedoms art 5 for psychiatrically ill prisoners); *R (on the application of H) v London North and East Region Mental Health Review Tribunal (Secretary of State for Health intervening)* [2001] EWCA Civ 415, [2002] QB 1 (continued detention of an asymptomatic patient). As to the Convention for the Protection of Human Rights and Fundamental Freedoms see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

15 As to medical recommendations see PARA 482 post.

16 See the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 4(1)(f), Sch 1 Forms 10, 11 (substituted by SI 1996/540). The recommendations may be joint in form: see the Mental Health Act 1983 s 11(7).

17 For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.

18 Mental Health Act 1983 s 3(3).

19 See the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, Sch 1 Forms 10, 11 (substituted by SI 1996/540).

20 Mental Health Act 1983 s 3(3).

21 le mental illness, severe mental impairment, mental impairment and psychopathic disorder: see *ibid* s 3(2)(a).

22 *Ibid* s 11(6). As to the reclassification of patients see s 16; and PARA 527 post.

UPDATE

460-463 Compulsory admission for assessment ... Compulsory admission and temporary detention of in-patients

SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

461 Compulsory admission for treatment

NOTE 4--As to the power to make a community treatment order for a patient detained under the Mental Health Act 1983 s 3, see ss 17A-17G; and PARA 528A.

TEXT AND NOTES 6-14--In head (1) for 'mental illness ... degree' read 'mental disorder'; head (2) omitted; and new head (4) that appropriate medical treatment is available for him: Mental Health Act 1983 s 3(2) (amended by Mental Health Act 2007 s 4(2)(a), (b), Sch 1 para 2, Sch 11 Pt 2). In the Mental Health Act 1983, references to appropriate medical treatment, in relation to a person suffering from mental disorder, are references to medical treatment which is appropriate in his case, taking into account the nature and degree of the mental disorder and all other circumstances of his case: s 3(4) (added by Mental Health Act 2007 s 4(3)).

TEXT AND NOTES 18, 19--References to head (2) are now to head (4): Mental Health Act 1983 s 3(3) (amended by Mental Health Act 2007 s 4(2)(c)).

TEXT AND NOTES 21, 22--Repealed: Mental Health Act 2007 Sch 11 Pt 1

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(4) HOSPITAL ADMISSIONS/462. Compulsory admission for assessment in an emergency.

462. Compulsory admission for assessment in an emergency.

In any case of urgent necessity, an application for admission to hospital¹ for assessment may be made either by an approved social worker² or by the nearest relative³ of the patient founded on one only of the two medical recommendations which are required⁴ in other cases⁵. This is known as an emergency application⁶. The application must include a statement, to be verified by the medical recommendation, that: (1) it is of urgent necessity for the patient to be admitted and detained for assessment⁷; and (2) compliance with the normal requirements relating to applications for admission for assessment would involve undesirable delay⁸. The medical recommendation for admission for assessment must be given, if practicable, by a practitioner who has previous acquaintance with the patient, and must otherwise comply with the general requirements⁹ as to medical recommendations¹⁰.

An emergency application ceases to have effect¹¹ on the expiration of 72 hours from the time when the patient is admitted to hospital unless a second medical recommendation¹² for assessment is given and is received by the managers¹³ of the hospital within that period¹⁴. If the two recommendations then together comply with the requirements as to medical recommendations¹⁵, the patient may be detained for assessment as if originally admitted in pursuance of an application for assessment not in an emergency and for the period allowed in those cases¹⁶. Unless and until a second medical recommendation is received, however, the statutory provisions relating to medical treatment do not apply to a patient admitted in an emergency¹⁷.

1 For the meaning of 'hospital', which for this purpose includes a registered establishment, see PARA 417 ante. For the meaning of 'registered establishment' see PARA 421 ante.

2 For the meaning of 'approved social worker' see PARA 427 ante.

3 Mental Health Act 1983 s 4(1). For the meaning of 'nearest relative' see PARA 453 ante.

4 Ie required under *ibid* s 2(3) (see PARA 460 ante), where the application for admission for assessment is not made in an emergency.

5 *Ibid* s 4(1), (3). This is unlikely to be a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 5: see *Winterwerp v Netherlands* (1981) 4 EHRR 228, ECtHR. See also *Kolanis v United Kingdom (Application 517/02)* [2005] All ER (D) 227 (Jun), ECtHR. As to the Convention for the Protection of Human Rights and Fundamental Freedoms see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 127 et seq.

As to the form of the application see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 4(1)(c), Sch 1 Forms 5, 6. The managers must make a record of admission and attach it to the application: reg 4(3), Sch 1 Form 14 (substituted by SI 1996/540). As to bilingual application forms to be used in Wales see the Mental Health (Hospital and Guardianship) (Welsh Forms) Regulations 1971, SI 1971/178, reg 3, Schedule.

6 Mental Health Act 1983 s 4(1). It is submitted that the general requirements as to applications for admission for assessment apply otherwise than as expressly modified by this provision or elsewhere. As to applications by approved social workers see PARA 451 ante; as to compulsory admission for assessment see PARA 460 ante; as to requirements for applications for hospital admission see PARA 480; and as to requirements for medical recommendations see PARA 482 post.

The Code of Practice (1999) PARAS 6.1-6.8 gives guidance on emergency admission: eg it should never be used for administrative convenience; it is wrong for patients to be admitted under the Mental Health Act 1983 s 4 rather than s 2 because it is more convenient for the second doctor to examine the patient in, rather than outside, hospital; and, to be satisfied that an emergency has arisen, there must be evidence of the existence of

a significant risk of mental or physical harm to the patient or others, and/or the danger of serious harm to property, and/or the need for physical restraint of the patient. As to the Code of Practice see PARA 436 ante.

7 Ie under the Mental Health Act 1983 s 2: see PARA 460 ante.

8 Ibid s 4(2).

9 Ie the requirements of ibid s 12 (as amended) (see PARA 482 post), so far as those requirements are applicable to a single recommendation.

10 Ibid s 4(3).

11 Ie the application will cease to constitute authority for the detention of the patient: see PARA 464 post.

12 Ie as required under the Mental Health Act 1983 s 2(3) (see PARA 460 ante).

13 For the meaning of 'managers' see PARA 439 ante.

14 Mental Health Act 1983 s 4(4). As to when it is deemed to be received see PARA 463 post. A record of the receipt of any recommendation must be made by the managers of the hospital: Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 4(4), Sch 1 Form 14 (amended by SI 1996/540). There is no common law power to detain once the statutory period has expired: *B v Forsey* 1988 SLT 572, HL.

15 Ie under the Mental Health Act 1983 s 12 (as amended), but excluding the requirement as to the time of signature of the second recommendation: see PARA 482 post.

16 See ibid ss 2(4), 4(3), 29(4); and PARA 460 ante.

17 See ibid s 56(1); and PARA 551 et seq post.

UPDATE

460-463 Compulsory admission for assessment ... Compulsory admission and temporary detention of in-patients

SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

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463. Compulsory admission and temporary detention of in-patients.

An application may be made for the admission of a patient¹ to a hospital² for assessment or for treatment notwithstanding that the patient is already an in-patient³ in that hospital and not liable to be detained in pursuance of any application⁴ for his compulsory admission⁵. Moreover, an application may be made for admission for treatment notwithstanding that the patient is already liable to be detained in hospital in pursuance of an application for his admission for assessment⁶.

Where it appears to the medical practitioner in charge of the treatment of a patient who is an in-patient but not liable to be detained⁷ that an application ought to be made for the patient's compulsory admission⁸, he may furnish to the managers⁹ of the hospital a written report to that effect; and in any such case the patient may be detained in the hospital for a period of 72 hours from the time when the report was so furnished¹⁰.

Where it appears to a nurse of a prescribed class¹¹ that a patient who is receiving treatment for mental disorder as an in-patient but who is not liable to be detained¹² is: (1) suffering from mental disorder to such a degree that it is necessary for his health or safety or for the protection of others that he has to be immediately restrained from leaving the hospital; and (2) that it is not practicable to secure the immediate attendance of a practitioner for the purpose of furnishing a report¹³, the nurse may record the fact in writing¹⁴, must deliver the record to the managers of the hospital as soon as possible after it is made¹⁵, and may detain the patient for a period of six hours from the time of recording or until the earlier arrival of a practitioner having power to furnish a report¹⁶.

The statutory provisions relating to medical treatment do not apply to patients detained under either of the temporary detention powers described above¹⁷.

1 For the meaning of 'patient' see PARA 435 ante.

2 For the meaning of 'hospital' see PARA 417 ante.

3 The term 'in-patient' is not defined. The Code of Practice (1999) PARA 8.4 states that an informal in-patient for this purpose is one who has willingly, or not unwillingly, entered and stayed in hospital and is receiving in-patient care or treatment without being subject to the use of compulsory powers under the Mental Health Act 1983. The provisions do not apply to an out-patient attending the hospital's accident and emergency department. Admission procedures should not be implemented with the sole intention of then using the power in s 5(2). As to the Code of Practice see PARA 436 ante.

4 Ie under the Mental Health Act 1983 s 2(1) (admission for assessment: see PARA 460 ante), s 3 (admission for treatment: see PARA 461 ante), or s 4 (emergency admission: see PARA 462 ante).

5 Ibid s 5(1). This is unlikely to be a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 5: see *Winterwerp v Netherlands* (1981) 4 EHRR 228, ECtHR. See also *Kolanis v United Kingdom (Application 517/02)* [2005] All ER (D) 227 (Jun), ECtHR. As to the Convention for the Protection of Human Rights and Fundamental Freedoms art 5 see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 127 et seq.

6 Mental Health Act 1983 s 5(1). Where an application is made by virtue of this provision the patient is treated for the purposes of Pt II (ss 2-34) (as amended) as if he had been admitted to the hospital at the time when the application was received by the managers: s 5(1). Time will therefore run beginning with that date for such purposes as duration of detention (see s 20(1); and PARA 518 post) and application to a mental health review tribunal (see s 66(1)(b); and PARA 564 post).

7 Ibid s 5(6).

8 ie under the Mental Health Act 1983 Pt II (as amended). See note 4 supra.

9 For the meaning of 'managers' see PARA 439 ante.

10 Mental Health Act 1983 s 5(2). For the form of report see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 4(1)(g), Sch 1 Form 12 (substituted by SI 1996/540). A record of admission must be made by the managers and attached to the report: Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 4(3), Sch 1 Form 14 (substituted by SI 1996/540). The practitioner in charge of treatment may nominate one (and no more) other practitioner on the staff to act for him in his absence: Mental Health Act 1983 s 5(3). The Code of Practice (1999) PARAS 8.1-8.17 gives guidance on the use of the doctor's holding power (ie under the Mental Health Act 1983 s 5(2)).

11 The prescribed class of nurse is a first level nurse trained in the nursing of persons suffering from learning disabilities: see the Mental Health (Nurses) Order 1998, SI 1998/2625 (made under the Mental Health Act 1983 s 5(4), (7)). See also PARA 422 ante.

12 Ibid s 5(6).

13 ie a report under ibid s 5(2).

14 Ibid s 5(4). The record made by the nurse must be in the form set out in the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 4(1)(h), Sch 1 Form 13 (amended by SI 1993/2156; SI 1998/2624). The time at which a patient ceases to be detained must be recorded in the form set out in the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 4(5), Sch 1 Form 16.

15 Mental Health Act 1983 s 5(5).

16 Ibid s 5(4). The time at which the patient ceased to be detained under this provision, or the arrival if earlier of the practitioner having power to furnish a report under s 5(2), must be recorded either by the nurse who made the original record or by another nurse of the prescribed class and authorised by the managers in that behalf, in the form prescribed: see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 4(5).

For guidance on the nurse's holding power (ie under the Mental Health Act 1983 s 5(4)) see Code of Practice (1999) PARAS 9.1-9.10.

17 See the Mental Health Act 1983 s 56(1); and PARA 551 et seq post. As to the meaning of 'medical treatment' see PARA 552 post.

UPDATE

460-463 Compulsory admission for assessment ... Compulsory admission and temporary detention of in-patients

SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

463 Compulsory admission and temporary detention of in-patients

NOTE 4--SI 1998/2625 replaced: Mental Health (Nurses) (England) Order 2008, SI 2008/1207; Mental Health (Nurses) (Wales) Order 2008, SI 2008/2441.

TEXT AND NOTES 7, 13--Now refers to the medical practitioner or approved clinician: Mental Health Act 1983 s 5(1), (4) (amended by Mental Health Act 2007 s 9(2)(a), (c)).

TEXT AND NOTE 7--Refers also to a community patient: Mental Health Act 1983 s 5(6) (amended by Mental Health Act 2007 Sch 3 para 1).

NOTE 10--Mental Health Act 1983 s 5(3) now s 5(3), (3A) (substituted by Mental Health Act 2007 s 9(2)(b)).

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464. Effect of applications for admission.

An application for the admission of a patient¹ to hospital² for assessment or for treatment duly completed in accordance with the relevant statutory provisions³ constitutes sufficient authority for the applicant, or any person authorised by the applicant, to take the patient and convey him to the hospital⁴. However, this power must be exercised, except in the case of emergency applications⁵, at some time within the period of 14 days beginning with the date on which a medical practitioner last examined the patient before giving a medical recommendation⁶ for the purposes of the application⁷; and, in the case of an emergency application, at some time within the period of 24 hours beginning with the date on which the patient was examined by the practitioner giving the first medical recommendation⁸ or at the time when the application is made, whichever is the earlier⁹.

Where a patient is admitted within these periods to the hospital specified in the application or, being already within that hospital, is treated as if he had been so admitted¹⁰, the application constitutes sufficient authority for the managers¹¹ of the hospital to detain the patient in the hospital¹².

1 For the meaning of 'patient' see PARA 435 ante.

2 For the meaning of 'hospital', which for this purpose includes a registered establishment, see PARA 417 ante. For the meaning of 'registered establishment' see PARA 421 ante.

3 I.e. the Mental Health Act 1983 ss 2-4 (see PARAS 460-462 ante) and s 11 (see PARAS 451 ante, 480 post).

4 Ibid s 6(1). The Code of Practice (1999) PARAS 11.1-11.15 gives guidance on conveying the patient to hospital. As to the Code of Practice see PARA 436 ante.

As to the position where the requirements of the Mental Health Act 1983 are not fulfilled see *R v Managers of South Western Hospital, ex p M* [1993] QB 683, [1994] 1 All ER 161; *Re S-C (Mental Patient: Habeas Corpus)* [1996] 1 All ER 532, [1996] 2 FCR 692, CA. See also *R v Central London County Court, ex p London* [1999] 3 All ER 991, [1999] 2 FLR 161, CA. As to possible damages for false imprisonment see *R v Riverside Mental Health Trust, ex p Huzzey* (1998) 43 BMLR 167. See also PARA 525 post.

5 I.e. applications for admission for assessment in an emergency: see the Mental Health Act 1983 s 4(1); and PARA 462 ante.

6 See *ibid* ss 2(3), 3(3); and PARAS 460-461 ante, 482 post.

7 Ibid s 6(1)(a).

8 See *ibid* s 4(3); and PARA 462 ante.

9 Ibid s 6(1)(b). See also PARA 482 post.

10 I.e. by virtue of *ibid* s 5(1) (see PARA 463 ante).

11 For the meaning of 'managers' see PARA 439 ante.

12 Mental Health Act 1983 s 6(2).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(4) HOSPITAL ADMISSIONS/465. Proof of form and contents.

465. Proof of form and contents.

Any application for the compulsory admission of a patient¹ to hospital² which appears to be duly made and to be founded on the necessary medical recommendations may be acted on without further proof of the signature or qualification of the person by whom the application or medical recommendation is made or given, or of any matter of fact or opinion stated in it³.

1 For the meaning of 'patient' see PARA 435 ante.

2 For the meaning of 'hospital' see PARA 417 ante.

3 Mental Health Act 1983 s 6(3). The application and recommendations on which it is founded should be carefully examined to see that they do appear to conform with the statutory requirements, but if the documents are in the proper form it seems that they would justify the reception and detention of the person named in them even if that person proves to be not in fact suffering from mental disorder: see *Norris v Seed* (1849) 3 Exch 782; *Mackintosh v Smith and Lowe* (1865) 4 Macq 913, HL.

The Code of Practice (1999) PARAS 12.1-12.5 gives guidance on the receipt and scrutiny of documents: eg the managers should formally delegate their duties to a limited number of officers with an adequate knowledge of the relevant parts of the Mental Health Act 1983; and those delegated to scrutinise documents must be clear about what kind of errors on application forms and medical recommendations can and cannot be corrected (see PARAS 467-468 post). As to the Code of Practice see PARA 436 ante.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(4) HOSPITAL ADMISSIONS/466. Cessation of previous applications.

466. Cessation of previous applications.

Where a patient is admitted to hospital in pursuance of an application for admission for treatment¹, any previous application² by virtue of which he was liable to be detained in hospital³ or subject to guardianship⁴ will cease to have effect⁵.

1 See the Mental Health Act 1983 s 3(1); and PARA 461 ante.

2 See under ibid Pt II (ss 2-34) (as amended).

3 See ibid ss 2, 4 (detention for assessment), s 3 (detention for treatment); and PARAS 460-462 ante.

4 As to guardianship applications see PARA 469 post.

5 Mental Health Act 1983 s 6(4).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(4) HOSPITAL ADMISSIONS/467. Rectification of application or recommendations.

467. Rectification of application or recommendations.

If, within the period of 14 days beginning with the day on which a patient¹ has been admitted to a hospital² in pursuance of an application for admission for assessment³ or for treatment⁴, the application or any medical recommendation given for the purposes of the application⁵ is found to be in any respect incorrect or defective, the application or recommendation may, within that period and with the consent of the managers⁶ of the hospital, be amended by the person by whom it was signed⁷. On the amendment being made the application or recommendation will have effect, and will be deemed to have had effect, as if it had been originally made as so amended⁸.

1 For the meaning of 'patient' see PARA 435 ante.

2 For the meaning of 'hospital' see PARA 417 ante.

3 See the Mental Health Act 1983 s 2(1); and PARA 460 ante.

4 See *ibid* s 3(1); and PARA 461 ante.

5 As to such recommendations see *ibid* ss 2(3), 3(3), 4(3), (4); and PARAS 460-462 ante. As to the general provisions applying to medical recommendations see PARA 482 post.

6 For the meaning of 'managers' see PARA 439 ante. The managers of the hospital or other relevant authorities and trusts may authorise an officer or class of officers or any other person on their behalf to consent to the amendment of an application or recommendation: see *ibid* 32(3) (as amended); and PARA 442 ante.

7 *Ibid* s 15(1). Use of an obsolete form would not invalidate an application or recommendation because minor departures from statutory form would be regarded as *de minimis*: see *Re E (Mental Health: Habeas Corpus)* (10 December 1966, unreported).

8 Mental Health Act 1983 s 15(1). For an application or recommendation to be capable of amendment under this provision, there must, it seems, be a document in existence which can properly be called an application or recommendation for the admission of the patient in question; thus an unsigned application or recommendation, or one referring to another patient, would not be capable of rectification.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(4) HOSPITAL ADMISSIONS/468. Procedure on insufficiency of medical recommendations.

468. Procedure on insufficiency of medical recommendations.

Without prejudice to the provisions for the rectification of an incorrect or defective application or recommendation¹, if it appears to the managers² of the hospital³ within the period of 14 days⁴ that one of the two recommendations on which an application for assessment or for treatment is founded is insufficient to warrant⁵ the detention of the patient⁶ in pursuance of the application, they may, within that period, give written notice to that effect to the applicant⁷. Where any such notice is given in respect of a recommendation, that recommendation is to be disregarded, but the application will be sufficient⁸, and will be deemed always to have been sufficient, if: (1) a fresh medical recommendation complying with the relevant statutory provisions⁹ (other than the provisions relating to the time of signature and the interval between examinations¹⁰) is furnished to the managers within the specified period¹¹; and (2) that recommendation and the other recommendation on which the application is founded together comply with those provisions¹². Where the two medical recommendations on which an application for admission for assessment or for treatment is founded are, taken together, insufficient to warrant the patient's detention in pursuance of the application¹³, a notice¹⁴ may be given by the managers in respect of either of those recommendations¹⁵. However, if the reason for their insufficiency, when taken together, is that they do not describe the patient as suffering from the same form of mental disorder, the notice cannot be given; no fresh recommendation can be furnished; and the application will have no effect in any event¹⁶.

The provisions for rectification¹⁷ do not authorise the giving of such a notice in respect of an application made as an emergency application¹⁸; nor do those provisions authorise the detention of a patient admitted in pursuance of an emergency application after the period of 72 hours authorised by such an application, unless a second medical recommendation has been given and received by the managers within that period and the two recommendations together comply (or would comply apart from any error or defect to which the provisions for rectification apply) with the requirements as to medical recommendations other than those as to the time of signature of the second recommendation¹⁹.

1 I.e. the Mental Health Act 1983 s 15(1) (see PARA 467 ante).

2 For the meaning of 'managers' see PARA 439 ante.

3 For the meaning of 'hospital' see PARA 417 ante.

4 I.e. beginning with the day of admission of the patient: see the Mental Health Act 1983 s 15(1); and PARA 464 ante.

5 The expression 'insufficient to warrant' is used in contrast with the expression 'in any respect incorrect or defective' in *ibid* s 15(1). It is submitted that the former expression would include eg a medical recommendation which is in the prescribed form but does not contain adequate or convincing reasons for the opinion expressed that the grounds for admission for treatment under s 3(2) exist: see s 3(3); and PARA 461 ante.

6 For the meaning of 'patient' see PARA 435 ante.

7 Mental Health Act 1983 s 15(2).

8 I.e. sufficient to warrant the patient's detention.

9 le the provisions of the Mental Health Act 1983 Pt II (ss 2-34) (as amended). The relevant provisions are s 2(3) (see PARA 460 ante), s 3(3) (see PARA 461 ante) and s 12 (as amended) (see PARA 482 post).

10 le under ibid s 12(1) (see PARA 482 post).

11 Ibid s 15(2)(a). See also the text to note 4 supra. The patient may be detained until the fresh medical recommendation is furnished.

12 Ibid s 15(2)(b).

13 The expression 'taken together, insufficient to warrant the detention' appears to contemplate a contingency in which two medical recommendations, each taken by itself sufficient to warrant the detention of the patient, are, taken together, insufficient to warrant the detention of the patient in pursuance of the application eg because the interval between the two examinations of the patient exceeded the five days prescribed by ibid s 12(1) (see PARA 482 post) or because neither of the two medical practitioners concerned has been approved by the Secretary of State as required by s 12(2) (see PARA 482 post).

14 le a notice under ibid s 15(2): see the text to note 7 supra.

15 Ibid s 15(3).

16 Ibid s 15(3). See also s 11(6); and PARA 461 ante.

17 See PARA 467 ante.

18 le under the Mental Health Act 1983 s 4 (see PARA 462 ante).

19 Ibid s 15(4). See also see s 4(4); and PARA 462 ante.

UPDATE

468 Procedure on insufficiency of medical recommendations

TEXT AND NOTE 16--Repealed: Mental Health Act 2007 Sch 11 Pt 1.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(5) GUARDIANSHIP/469. Guardianship applications.

(5) GUARDIANSHIP

469. Guardianship applications.

A patient¹ who has attained the age of 16 years² may be received into guardianship for the period allowed³ in pursuance of an application (referred to as a guardianship application) made in accordance with the Mental Health Act 1983⁴. The patient⁵ may apply to a mental health review tribunal within the six months beginning with the day on which the guardianship application is accepted⁶.

A guardianship application may be made⁷ in respect of a patient on the grounds: (1) that he is suffering from mental disorder⁸ being mental illness⁹, severe mental impairment, psychopathic disorder or mental impairment¹⁰, and that his disorder is of a nature or degree which warrants his reception into guardianship under the Mental Health Act 1983¹¹; and (2) that it is necessary in the interests of the welfare of the patient or for the protection of other persons that the patient should be so received¹².

A guardianship application must be founded on the written recommendations in the prescribed form¹³ of two registered medical practitioners¹⁴, including in each case a statement that in the opinion of the practitioner the conditions forming the grounds of the application are complied with¹⁵. Each recommendation must include prescribed particulars¹⁶ of the grounds for that opinion so far as it relates to the first condition and also, so far as it relates to the second condition, a statement of the reasons for that opinion¹⁷.

A guardianship application¹⁸, and any recommendation given for the purpose of such an application, may describe the patient as suffering from more than one of the forms of mental disorder for which reception into guardianship is possible¹⁹; but the application is of no effect unless the patient is described in each of the recommendations as suffering from the same one of those forms of mental disorder, whether or not he is also described in either of the recommendations as suffering from another of those forms²⁰.

1 For the meaning of 'patient' generally see PARA 435 ante.

2 Mental Health Act 1983 s 7(1). The application must state the age of the patient if known or, if the exact age is not known, that the patient is believed (if this is true) to have attained the age of 16: s 7(4). As to s 7 see *Re G (An Adult) (Mental Capacity: Court's Jurisdiction)* [2004] EWHC 2222 (Fam), [2004] All ER (D) 33 (Oct).

3 The period allowed in the first instance is a period not exceeding six months beginning with the day on which the guardianship application is accepted (see the Mental Health Act 1983 s 20(1); and PARA 518 post); the authority for guardianship may be renewed at the expiration of the first period for a further period of six months and thereafter for one year at a time (see s 20(2)). There is no provision for reception into guardianship for assessment or for assessment in an emergency.

4 Ibid s 7(1). For the forms of application see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 5(1)(a), Sch 1 Forms 17, 18. Where an application is accepted by the local social services authority (see PARA 424 ante), a record of acceptance must be attached to the application: reg 5(3), Sch 1 Form 21. As to bilingual application forms to be used in Wales see the Mental Health (Hospital and Guardianship) (Welsh Forms) Regulations 1971, SI 1971/178, reg 3, Schedule. As to the general provisions governing applications for guardianship see PARA 481 post.

The Code of Practice (1999) PARAS 13.1-13.11 gives general guidance on guardianship: eg its purpose is to enable patients to receive community care where it cannot be provided without the use of compulsory powers; it enables the establishment of an authoritative framework for working with a patient with a minimum of constraint to achieve as independent a life as possible within the community. As to the Code of Practice see PARA 436 ante.

- 5 For the meaning of 'patient' see PARA 435 ante.
- 6 As to the acceptance of guardianship applications see PARA 481 post. As to applications to mental health review tribunals see the Mental Health Act 1983 s 66(1)(c), (i), (2)(c); and PARA 564 post.
- 7 Applications may be made either by the nearest relative of the patient (see PARA 453 ante) or by an approved social worker (see PARA 427 ante): *ibid* s 11(1). As to applications by approved social workers generally see PARA 451 ante. For general requirements as to applications see PARAS 480-481 post.
- 8 For the meaning of 'mental disorder' see PARA 402 ante.
- 9 There is no statutory definition of 'mental illness', but see *W v L* [1974] QB 711, [1973] 3 All ER 884, CA; and PARA 402 ante.
- 10 For the meanings of 'severe mental impairment' 'mental impairment' and 'psychopathic disorder' see PARA 403 ante. People with mental handicaps or learning disabilities are not included unless, in addition to severe or significant impairment of intelligence and social functioning, their condition is associated with abnormally aggressive or seriously irresponsible conduct on their part: Mental Health Act 1983 s 1(2). See *Re F (Mental Health Act Guardianship)* [2000] 1 FCR 11, [2000] 1 FLR 192, CA (patient's desire to return home not seriously irresponsible conduct).
- 11 Mental Health Act 1983 s 7(2)(a).
- 12 *Ibid* s 7(2)(b).
- 13 Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 5(1)(c), Sch 1 Forms 19, 20. A record of the receipt of any recommendation must be made and attached to the recommendation: reg 5(4), Sch 1 Form 15 (substituted by SI 1996/540). See also the Mental Health (Hospital and Guardianship) (Welsh Forms) Regulations 1971, SI 1971/178, reg 3, Schedule.
- 14 For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante. As to the general requirements for medical recommendations see PARA 482 et seq post.
- 15 Mental Health Act 1983 s 7(3).
- 16 As to the prescribed particulars see PARA 461 ante.
- 17 Mental Health Act 1983 s 7(3)(a), (b). The practitioner is not required, as he is when giving a recommendation for admission for treatment, to specify whether other methods of dealing with the patient are available, and if so why they are not appropriate: cf s 3(3)(b); and PARA 461 ante.
- 18 As to applications generally see PARAS 480-481 post.
- 19 *Re* mental illness, severe mental impairment, mental impairment and psychopathic disorder: see the Mental Health Act 1983 s 1(2); and PARAS 402-403 ante.
- 20 See *ibid* s 11(6); and PARA 461 ante. As to the reclassification of patients see s 16; and PARA 527 post.

UPDATE

469 Guardianship applications

NOTES 4, 13--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

TEXT AND NOTES 9-11--Words 'being mental illness ... his disorder is' omitted: Mental Health Act 1983 s 7(2) (amended by Mental Health Act 2007 Sch 1 para 3, Sch 11 Pt 1).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(5) GUARDIANSHIP/470. Wards of court.

470. Wards of court.

A guardianship application may not be made in respect of a minor who is a ward of court¹, nor may such a minor be transferred into guardianship² without the leave of the court³.

Where a supervision application has been made⁴ in respect of a minor who is a ward of court, the provisions of Part II of the Mental Health Act 1983⁵ relating to after-care under supervision have effect in relation to the minor, subject to any order which the court may make in the exercise of its wardship jurisdiction⁶.

1 As to wards of court see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 218 et seq.

2 Mental Health Act 1983 s 33(3). As to the different consequences of guardianship and wardship see *Re F (Mental Health Act Guardianship)* [2000] 1 FCR 11, [2000] 1 FLR 192, CA.

3 Mental Health Act 1983 s 33(2). The leave of the court must also be obtained before the ward's nearest relative may exercise his powers: s 33(2). As to the nearest relative see PARA 453 ante.

4 As to supervision applications and after-care under supervision see *ibid* ss 25A-25J (as added and amended); and PARA 528 et seq post.

5 *Ie* the Mental Health Act 1983 Pt II (ss 2-34) (as amended).

6 *Ibid* s 33(4) (added by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 3).

UPDATE

470 Wards of court

NOTE 4--Mental Health Act 1983 ss 25A-25J replaced by ss 17A-17G: see PARA 528A.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(5) GUARDIANSHIP/471. Effect of application.

471. Effect of application.

Where a guardianship application is duly made¹, forwarded to the local social services authority² within the period allowed³, and accepted⁴ by that authority, it confers on the authority or person named in the application as guardian⁵, the power to: (1) require the patient to reside at a place specified by the authority or person named as guardian⁶; (2) require the patient to attend at places and times so specified for the purpose of medical treatment, occupation, education or training⁷; (3) require access to the patient to be given, at any place where the patient is residing, to any registered medical practitioner, approved social worker⁸ or other person so specified⁹.

Where a patient is received into guardianship in pursuance of a guardianship application, any previous application¹⁰ by virtue of which he was subject to guardianship or liable to be detained in a hospital¹¹ ceases to have effect¹².

1 le under the provisions of the Mental Health Act 1983 Pt II (ss 2-34) (as amended): see PARA 469 ante. As to guardianship generally see Code of Practice (1999) ch 13. As to the Code of Practice see PARA 436 ante.

Guardianship is not necessarily a 'detention' for the purposes of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 5 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 127 et seq); factors such as type, duration and intensity of restrictions are important: see *Guzzardi v Italy* (1980) 3 EHRR 333; *Ashingdane v United Kingdom* (1985) 7 EHRR 528, ECtHR. As to the implied statutory duty to act in the welfare of the patient see *R v Kent County Council, ex p Marston* CO/1819/96.

2 As to the local social services authority see PARA 424 ante.

3 le the period of 14 days beginning with the date on which a registered medical practitioner last examined the patient before giving a medical recommendation for the purpose of the application: Mental Health Act 1983 s 8(2). For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante. For the meaning of 'patient' see PARA 435 ante.

4 As to acceptance see further PARA 481 post.

5 The guardian named may be either a local social services authority or any other person (including the applicant) but in the latter case the application is of no effect unless accepted on that person's behalf by the local social services authority for the area in which he resides and it must be accompanied by a statement in writing by that person that he is willing to act as guardian: Mental Health Act 1983 s 7(5). See further PARA 481 post.

6 Ibid s 8(1)(a).

7 Ibid s 8(1)(b). As to the meaning of 'medical treatment' see PARA 552 post.

8 For the meaning of 'approved social worker' see PARA 427 ante.

9 Mental Health Act 1983 s 8(1)(c).

10 le under ibid ss 2(1), 3(1), 4(1), 7(1): see PARAS 460-462, 469 ante.

11 For the meaning of 'hospital' see PARA 417 ante.

12 Mental Health Act 1983 s 8(5).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(5) GUARDIANSHIP/472. Proof of form and contents.

472. Proof of form and contents.

A guardianship application which appears to be duly made¹ and to be founded on the necessary medical recommendations may be acted on without further proof of the signature or qualification of the person by whom the application or any such medical recommendation is made or given, or of any matter of fact or opinion stated in the application².

1 Ie under the provisions of the Mental Health Act 1983 Pt II (ss 2-34) (as amended): see PARA 469 ante.

2 Ibid s 8(3). See also PARA 465 ante.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(5) GUARDIANSHIP/473. Rectification of guardianship application or recommendation.

473. Rectification of guardianship application or recommendation.

If, within the period of 14 days beginning with the day on which a guardianship application has been accepted by the local social services authority¹, the guardianship application or any medical recommendation given for the purposes of the application is found to be in any respect incorrect or defective², the application or recommendation may, within that period and with the consent of that authority³, be amended by the person by whom it was signed; on the amendment being made the application or recommendation has effect, and is deemed to have had effect, as if it had been originally made as so amended⁴.

1 See PARA 471 text and note 3 ante. As to the local social services authority see PARA 424 ante.

2 Cf the Mental Health Act 1983 s 15(1); and PARA 467 ante.

3 The local social services authority may authorise in writing an officer or class of officers or any other person on its behalf to consent to the amendment of an application or medical recommendation for guardianship: Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 5(2).

4 Mental Health Act 1983 s 8(4). There is no provision in s 8, as there is in s 15(3), (4) (see PARA 468 ante), for the obtaining of a fresh medical recommendation in substitution for one which does not appear to warrant the reception of the patient into guardianship.

UPDATE

473 Rectification of guardianship application or recommendation

NOTE 3--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(5) GUARDIANSHIP/474. Power to make regulations as to guardianship.

474. Power to make regulations as to guardianship.

The Secretary of State¹ may make regulations for regulating the exercise by guardians of their powers², and for imposing upon them, and upon local social services authorities³ in the case of patients⁴ under the guardianship of persons other than local social services authorities⁵, such duties as he considers necessary or expedient in the interests of the patients⁶.

1 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

2 As to the powers of a guardian see PARA 471 ante.

3 As to local social services authorities see PARA 424 ante.

4 For the meaning of 'patient' see PARA 435 ante.

5 See PARA 471 ante.

6 Mental Health Act 1983 s 9(1). The regulations may in particular provide for the visiting of patients on behalf of the local social services authority concerned and must provide for the appointment, in the case of a patient subject to the guardianship of a person other than a local social services authority, of a medical practitioner to act as the nominated medical attendant of the patient: s 9(2). See the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, regs 12, 13; and PARAS 475-476 post.

UPDATE

474 Power to make regulations as to guardianship

NOTE 6--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(5) GUARDIANSHIP/475. Visits on behalf of the responsible local social services authority.

475. Visits on behalf of the responsible local social services authority.

The responsible local social services authority¹ must arrange for every patient who is subject to guardianship to be visited at intervals of not more than three months, and at least one such visit in any year must be made by an approved² medical practitioner³.

1 The responsible local social services authority is: (1) where the patient is subject to the guardianship of a local social services authority, that authority; and (2) where the patient is subject to the guardianship of another person, the local social services authority for the area in which that person resides: Mental Health Act 1983 s 34(3). For the meaning of 'local social services authority' see PARA 424 ante. For the meaning of 'patient' see PARA 435 ante. As to guardianship applications generally see PARA 469 ante.

2 Is approved under the Mental Health Act 1983 s 12 (as amended): see PARA 482 post.

3 Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 13. For the duty of a local social services authority to visit and to take other steps in relation to a guardianship patient admitted (for any reason) to hospital see PARA 430 ante. As to visits to guardianship patients with a view to ordering discharge or making an application to a mental health review tribunal see PARAS 526, 566 post. Obstruction of visits to guardianship patients is an offence: see PARA 772 post.

UPDATE

475 Visits on behalf of the responsible local social services authority

NOTE 3--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(5) GUARDIANSHIP/476. Duties of private guardians.

476. Duties of private guardians.

Where a patient¹ is subject to the guardianship of a private guardian²:

- 5 (1) the guardian must appoint a medical practitioner to act as the patient's nominated medical attendant³ for the purposes of the Mental Health Act 1983, and must notify the responsible local social services authority⁴ of his name and address⁵;
- 6 (2) in exercising powers and duties conferred or imposed on him by the Act or regulations⁶, the guardian must comply with directions given by the responsible local social services authority, and furnish it with such reports and information with regard to the patient as it may require⁷;
- 7 (3) on the patient's reception into guardianship, the guardian must notify the responsible local social services authority of his address and that of the patient, and on any permanent change of either address must notify that authority of the new address either before or not later than seven days after the change takes place; if the new address is in the area of a different local social services authority, the guardian must notify that authority of his address and that of the patient, and of the name and address of the patient's nominated medical attendant, and a copy of the notification must be sent to the local social services authority which was formerly responsible⁸; and
- 8 (4) in the event of the death of the patient or the termination of the guardianship by discharge, transfer or otherwise, the guardian must as soon as reasonably practicable notify the responsible local social services authority⁹.

1 For the meaning of 'patient' see PARA 435 ante.

2 'Private guardian' in relation to a patient, means a person, other than a local social services authority (see PARA 424 ante), who acts as a guardian under the Mental Health Act 1983: Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 2(1). As to guardianship applications generally see PARA 469 ante.

3 'Nominated medical attendant', in relation to a patient who is subject to the guardianship of a person other than a local social services authority, means the person appointed in pursuance of regulations made under the Mental Health Act 1983 s 9(2) (see PARA 474 note 6 ante) to act as the medical attendant of the patient: s 34(1).

4 For the meaning of 'responsible local social services authority' see PARA 475 note 1 ante.

5 Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 12(a), (b).

6 I.e. the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893 (as amended).

7 Ibid reg 12(c), (d).

8 Ibid reg 12(e), (f).

9 Ibid reg 12(g).

UPDATE

476 Duties of private guardians

TEXT AND NOTES--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(5) GUARDIANSHIP/477. Absence without leave of patients subject to guardianship.

477. Absence without leave of patients subject to guardianship.

Where a patient¹ subject to guardianship² absents himself without the leave³ of the guardian from the place at which he is required by the guardian to reside⁴, he may, within the period permitted⁵, be taken into custody⁶ and returned to that place by any officer on the staff of a local social services authority⁷, by any constable⁸, or by any person authorised in writing by the guardian or a local social services authority⁹. A patient must not be so taken into custody after the later of the end of six months beginning with the first day of his absence without leave and the end of the period for which he is liable to be detained or subject to guardianship¹⁰.

1 For the meaning of 'patient' see PARA 435 ante.

2 As to guardianship applications generally see PARA 469 ante.

3 For the meaning of 'absent without leave' see PARA 507 note 4 post.

4 See PARA 471 ante.

5 le by the Mental Health Act 1983 s 18(4): see the text and note 10 infra.

6 For the meaning of 'legal custody' see PARA 446 ante.

7 As to the local social services authority see PARA 424 ante.

8 As to the office of constable see POLICE vol 36(1) (2007 Reissue) PARA 101 et seq.

9 Mental Health Act 1983 s 18(3). The power of arrest under s 18 (as amended) was preserved by the Police and Criminal Evidence Act 1984 s 26(2), Sch 2: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 927.

10 See the Mental Health Act 1983 s 18(4) (as substituted); and PARA 507 post.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(5) GUARDIANSHIP/478. Death or resignation of the guardian.

478. Death or resignation of the guardian.

If any person (other than a local social services authority¹) having the guardianship of a patient² received into guardianship³ dies or gives notice in writing to the local social services authority that he desires to relinquish the functions of guardian, the guardianship of the patient then vests in the local social services authority⁴. The authority may either continue to act as guardian, or guardianship may subsequently be transferred in pursuance of the appropriate regulations⁵ to another person who is willing to act⁶.

1 As to the local social services authority see PARA 424 ante.

2 For the meaning of 'patient' see PARA 435 ante.

3 I.e. under the Mental Health Act 1983 Pt II (ss 2-34) (as amended), in pursuance of a guardianship application under s 7(1) (see PARA 469 ante) or a guardianship order (see PARA 502 post), since a patient subject to such an order is to be treated for this purpose as if he had been received into guardianship in pursuance of such an application under Pt II (as amended): s 40(2).

4 See *ibid* s 10(1)-(3). On the termination of guardianship by discharge, transfer or otherwise, the guardian must notify the responsible local social services authority (see PARA 475 note 1 ante): see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, regs 12(g), 15; and PARA 476 ante.

5 *Ibid* reg 8; and see PARAS 511-514 post.

6 Mental Health Act 1983 s 10(1). If any person is incapacitated by illness or any other cause from performing the functions of a guardian, and has not given written notice to the local social services authority that he desires to relinquish those functions, the authority may during his incapacity perform them on his behalf or any other person approved by the authority for that purpose may do so: s 10(2). If the guardian has performed his functions negligently or in a manner contrary to the interests of the welfare of the patient, a court may order that the guardianship be transferred to the local social services authority or to any person approved for the purpose by that authority: see s 10(3); and PARA 479 post.

UPDATE

478 Death or resignation of the guardian

NOTE 4--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(5) GUARDIANSHIP/479. Transfer of guardianship by order of the county court.

479. Transfer of guardianship by order of the county court.

If it appears to the county court¹ on application made by an approved social worker² that any person other than a local social services authority³ having the guardianship of a patient⁴ received into guardianship⁵ has performed his functions negligently or in a manner contrary to the interests of the welfare of the patient, the court may order that the guardianship of the patient be transferred to the local social services authority or to any other person approved for the purpose by that authority⁶.

1 As to county courts generally see COURTS vol 10 (Reissue) PARA 701 et seq.

2 For the meaning of 'approved social worker' see PARA 427 ante.

3 As to the local social services authority see PARA 424 ante.

4 For the meaning of 'patient' see PARA 435 ante.

5 Ie under the Mental Health Act 1983 Pt II (ss 2-34) (as amended): see PARA 478 note 3 ante.

6 Ibid s 10(3). As to the procedure on such an application see CPR Sch 2 CCR Ord 49 r 12; and PARA 459 ante.

UPDATE

479 Transfer of guardianship by order of the county court

TEXT AND NOTE 2--Reference to an approved social worker now to to an approved mental health professional: Mental Health Act 1983 s 10(3) (amended by Mental Health Act 2007 Sch 2 para 3(2)).

TEXT AND NOTES--In this context, 'the local social services authority', in relation to a person (other than a local social services authority) who is the guardian of a patient, means the local social services authority for the area in which that person resides (or resided immediately before his death): Mental Health Act 1983 s 10(5) (added by Mental Health Act 2007 Sch 2 para 3(3)).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(6) GENERAL REQUIREMENTS FOR APPLICATIONS AND MEDICAL RECOMMENDATIONS/480. Requirements for applications for hospital admission.

(6) GENERAL REQUIREMENTS FOR APPLICATIONS AND MEDICAL RECOMMENDATIONS

480. Requirements for applications for hospital admission.

An application for the admission of a patient¹ for assessment² or for treatment³ may generally⁴ be made either by the patient's nearest relative⁵ or by an approved social worker⁶. Every such application must be addressed to the managers⁷ of the hospital⁸ to which admission is sought and must specify the applicant's qualification⁹ to make the application¹⁰.

No application for the admission of a patient may be made by any person unless that person has personally seen¹¹ the patient within the period of 14 days ending with the date of the application¹², but an emergency application cannot be made unless the applicant has personally seen the patient within the previous 24 hours¹³.

An application for the admission of a patient will be sufficient if the recommendations¹⁴ on which it is founded are given either as separate recommendations, each signed by a medical practitioner, or as a joint recommendation signed by two such practitioners¹⁵.

If the patient is a minor who is a ward of court¹⁶, an application for admission may only be made with the leave of the court¹⁷.

1 For the meaning of 'patient' see PARA 435 ante.

2 Ie under the Mental Health Act 1983 s 2(1) or, in an emergency, under s 4(1): see PARAS 460, 462 ante. For the form of application by the nearest relative see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 4(1)(a), (c), Sch 1 Form 1; for the form of application by an approved social worker see Sch 1 Form 2 (substituted by SI 1996/540); for the form of an emergency application by the nearest relative see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, Sch 1 Form 5; and for the form of an emergency by an approved social worker see Sch 1 Form 6.

3 Ie under the Mental Health Act 1983 s 3(1): see PARA 461 ante. For the form of application by the nearest relative see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, Sch 1 Form 8; and for the form of application by an approved social worker see Sch 1 Form 9 (substituted by SI 1996/540).

4 Ie the provisions of the Mental Health Act 1983 s 11: see notes 6-17 infra; and PARAS 451, 461, 469 ante.

5 For the meaning of 'nearest relative' see PARA 453 ante.

6 Mental Health Act 1983 s 11(1). For the meaning of 'approved social worker' see PARA 427 ante. For the duties and powers of approved social workers in relation to the making of applications under the Mental Health Act 1983 see PARA 451 ante.

7 For the meaning of 'managers' see PARA 439 ante. An application for admission must be served by delivering it to an officer of the managers of the hospital to which admission is sought who is authorised to receive it: Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 3(2). The application is properly addressed if addressed to the administrator of the hospital: reg 3(5). As to the service and proof of documents see further reg 3; and PARAS 448-449 ante.

8 For the meaning of 'hospital' see PARA 417 ante.

9 Ie as nearest relative or as approved social worker.

10 Mental Health Act 1983 s 11(1), (2).

11 'Personally seen' means without an intermediary: see *R v Managers of South Western Hospital, ex p M* [1993] QB 683, [1994] 1 All ER 161; *Re Whitbread (Mental Patient: Habeas Corpus)* (1997) 141 Sol Jo LB 152, CA.

12 Mental Health Act 1983 s 11(5).

13 Ibid s 11(5) (modified by s 4(5)). It is submitted that the provisions of s 11 otherwise apply to emergency applications as they apply to applications for admission for assessment. As to emergency applications see generally para 462 ante.

14 As to recommendations see PARA 482 post.

15 Mental Health Act 1983 s 11(7).

16 As to wards of court generally see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 218 et seq.

17 Mental Health Act 1983 s 33(1). After admission, the power of the nearest relative under s 23 (as amended) (see PARA 523 post) to discharge a patient who is a ward of court may only be exercised with the leave of the court: s 33(2).

UPDATE

480 Requirements for applications for hospital admission

TEXT AND NOTES 1-6--No application under the Mental Health Act 1983 s 11(1) may be made by an approved mental health professional if the circumstances are such that there would be a potential conflict of interest for the purposes of regulations under s 12A: s 11(1A) (added by Mental Health Act 2007 s 22(2)). The Secretary of State and the Welsh Ministers may make regulations as to the circumstances in which there would be such a potential conflict of interest: Mental Health Act 1983 s 12A (added by Mental Health Act 2007 s 22(5)). See Mental Health (Conflicts of Interest) (England) Regulations 2008, SI 2008/1205; Mental Health (Conflict of Interest) (Wales) Regulations 2008, SI 2008/2440.

NOTES 2, 3--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

TEXT AND NOTE 6--Reference to an approved social worker now to an approved mental health professional: Mental Health Act 1983 s 11(1) (amended by Mental Health Act 2007 Sch 2 para 4(2)).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(6) GENERAL REQUIREMENTS FOR APPLICATIONS AND MEDICAL RECOMMENDATIONS/481. Requirements for guardianship applications.

481. Requirements for guardianship applications.

The general provisions relating to applications for admission to hospital for treatment¹ apply also to guardianship applications². The person named as guardian in such an application may be either a local social services authority³ or any other person, including the applicant himself⁴. The application must be addressed and forwarded⁵ to the local social services authority which is named as guardian in the application, or, if a local social services authority is not so named, to the local social services authority for the area in which the person named as guardian resides⁶. If such an authority is not named as guardian, the application must be accompanied by a statement in writing⁷ by the person so named that he is willing to act as guardian⁸. Such an application is of no effect unless it is accepted on behalf of that person by the local social services authority for the area in which he resides⁹.

1 See the Mental Health Act 1983 s 11(1), (2), (4), (5), (7); note 6 infra; and PARAS 451, 480 ante.

2 For the form for guardianship application by the nearest relative see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 5(1)(a), Sch 1 Form 17 Pt I; for the form for application by an approved social worker see Sch 1 Form 18 Pt I. As to the grounds on which an application may be founded see the Mental Health Act 1983 s 7(2); and PARA 469 ante. As to the general provisions relating to medical recommendations for guardianship see PARA 482 post. As to the effect and rectification of guardianship applications see PARAS 472-473 ante.

3 As to the local social services authority see PARA 424 ante.

4 Mental Health Act 1983 s 7(5).

5 As to the service of documents on a local social services authority see PARA 448 ante.

6 Mental Health Act 1983 s 11(2). As to acceptance of applications see note 9 infra.

7 The form is prescribed by the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 5(1)(b), Sch 1 Form 17 Pt II, Form 18 Pt II.

8 Mental Health Act 1983 s 7(5).

9 Ibid s 7(5). The application comes into effect when it is accepted by the local social services authority: see s 8(1); and PARA 471 ante. Where the application is accepted, a record must be made in the prescribed form and attached to the application: Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 5(3), Sch 1 Form 21 (substituted by SI 1996/540).

UPDATE

481 Requirements for guardianship applications

NOTES--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(6) GENERAL REQUIREMENTS FOR APPLICATIONS AND MEDICAL RECOMMENDATIONS/482. Requirements for medical recommendations.

482. Requirements for medical recommendations.

The medical recommendations required¹ for the admission of a patient² to hospital³ under the Mental Health Act 1983⁴ must be signed on or before the date of the application which they support⁵. They must be given by medical practitioners who have personally examined⁶ the patient either together or separately, but in the latter case not more than five days may elapse between the days on which the separate examinations take place⁷. The application itself will be effective⁸ for a period of 14 days beginning with the date on which the patient was last examined by one of the practitioners giving the recommendations⁹, except in the case of an emergency application, which will be effective for 24 hours only, beginning from the time when the patient was examined by the practitioner giving the medical recommendation or when the application is made, whichever is the earlier¹⁰.

One of the two medical recommendations must be given by a practitioner approved for the purpose by the Secretary of State¹¹ as having special experience in the diagnosis or treatment of mental disorder¹²; unless that practitioner has previous acquaintance with the patient, the other recommendation must, if practicable, be given by a medical practitioner who has such acquaintance¹³.

Where the application is for the admission of the patient to a hospital which is not a registered establishment¹⁴, one, but not more than one, of the medical recommendations may be given by a practitioner on the staff of that hospital, except where it is proposed that the patient is to be accommodated¹⁵ as a private patient or otherwise accommodated, by virtue of an undertaking to pay in respect of the accommodation, in a hospital vested in an NHS foundation trust¹⁶. A general practitioner employed part-time at a hospital is not to be regarded as a practitioner on its staff for these purposes¹⁷.

1 Ie required by the Mental Health Act 1983 s 2(3) (see PARA 460 ante), s 3(3) (see PARA 461 ante), s 4(3) (see PARA 462 ante).

2 For the meaning of 'patient' see PARA 435 ante.

3 For the meaning of 'hospital' see PARA 417 ante.

4 Ie under the Mental Health Act 1983 Pt II (ss 2-34) (as amended), for assessment under s 2(1) (see PARA 460 ante), for treatment under s 3(1) (see PARA 461 ante), or for assessment in an emergency under s 4(1) (see PARA 462 ante).

5 Ibid s 12(1). Where two recommendations are required, they may be separate or joint: s 11(7). For the form of joint or individual recommendations for admission for assessment see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, regs 4(1)(b), (d), (f), 5(1)(c), Sch 1 Forms 3, 4 (substituted by SI 1996/540); for the form of recommendations for emergency admission for assessment see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, Sch 1 Form 7 (substituted by SI 1996/540); for the form of joint or individual recommendations for admission for treatment see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, Sch 1 Forms 10, 11 (substituted by SI 1996/540); for the form of joint or individual recommendations for guardianship see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, Sch 1 Forms 19, 20.

The Code of Practice (1999) PARA 2.1 et seq gives general guidance about the assessment by approved social workers and doctors of the needs of a person with mental health problems, where it may lead to an application for admission under the Mental Health Act 1983. As to the individual professional responsibility of the doctor see Code of Practice (1999) PARA 2.22; as to medical examinations and recommendations see Code of Practice

(1999) PARAS 2.23-2.30; and as to disagreements between doctors and approved social workers see Code of Practice (1999) PARAS 2.33-2.34. As to the Code of Practice see PARA 436 ante.

A doctor who completes a medical recommendation form is acting in his clinical capacity and is not providing a reasoned determination in the manner of a mental health review tribunal: *R (on the application of H) v Oxfordshire Mental Healthcare NHS Trust* [2002] EWHC 465 (Admin), [2002] All ER (D) 63 (Mar). A doctor making recommendations under the Mental Health Act 1983 is exercising the functions of a public authority under the Human Rights Act 1998 s 6(3)(b) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq): *R (on the application of Wilkinson) v Responsible Officer of Broadmoor Hospital* [2002] EWCA Civ 1545, [2002] 1 WLR 419. Assessment must be on the basis of actual mental health and not past events: *Varbanov v Bulgaria (Application 31365/96)* (5 October 2000, unreported), ECtHR. As to the recommending doctor's liability in tort to the patient for negligence or unlawful imprisonment see *Everett v Griffiths* [1921] 1 AC 631, HL; *Harnett v Fisher* [1927] AC 573, HL.

6 The Code of Practice (1999) PARA 2.23 gives guidance on the requirements of a proper medical examination. Doctors must always discuss the case with one another (Code of Practice (1999) PARA 2.25) and at least one, but preferably both, should discuss it with the applicant (Code of Practice (1999) PARA 2.26). As to the expression 'personally examined' see also *Routley v Worthing Health Authority* (14 January 1983) Lexis, CA.

7 Mental Health Act 1983 s 12(1).

8 It will constitute authority for the patient's conveyance to hospital and his detention there: see *ibid* s 6(1), (2).

9 See *ibid* s 6(1)(a); and PARA 464 ante.

10 See *ibid* s 6(1)(b); and PARAS 462, 464 ante. However, it seems that an effective application, even if signed at a time before the examination, could never be made earlier than the date of examination, because the medical recommendation must be signed on or before the date of the application: see ss 4(3), 12(1).

11 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante. As to doctors approved under *ibid* s 12 (as amended) see Code of Practice (1999) PARAS 2.40-2.42.

12 Mental Health Act 1983 s 12(2). See *R v Trent Health Authority, ex p Somaratne* (1996) 31 BMLR 140, CA (the matters which a health authority can consider when deciding whether to grant or refuse approval are limited to the matters of special experience stipulated in the Mental Health Act 1983 s 12(2)).

13 *Ibid* s 12(2). It is submitted that 'acquaintance' must mean a doctor and patient relationship. If neither of the medical practitioners knew the patient before making their recommendation, the applicant must explain on the application form why he could not get a recommendation from a practitioner who did know the patient: see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 4(1), Sch 1 Forms 1, 2, 5, 6, 8, 9, 17, 18 (Forms 2, 9 substituted by SI 1996/540).

As to the meanings of 'practicable' and 'previous acquaintance' see *Reed v Bronglais Hospital Pembrokeshire and Derwen NHS Trust* [2001] EWHC 792 (Admin); *R (on the application of C) v London Maudsley NHS Trust and the Mental Health Review Tribunal* [2003] EWHC 3467 (Admin). There was criticism in both cases of the wording of the Code of Practice (1999) PARA 2.29, and the suggestion that the test is one of 'exceptional circumstances' instead of 'practicability' was considered wrong.

14 For the meaning of 'registered establishment' see PARA 421 ante.

15 It is accommodated under the National Health Service Act 1977 s 18A(4) (as added), s 65 (as substituted and amended) or under the National Health Service and Community Care Act 1990 s 5(8), (9), Sch 2 Pt II para 14 (s 5(9) as substituted). As to provision of accommodation for private patients see HEALTH SERVICES vol 54 (2008) PARAS 745-747.

16 Mental Health Act 1983 s 12(3) (amended by the National Health Service and Community Care Act 1990 s 66(1), Sch 9 para 24(1); the Care Standards Act 2000 s 116, Sch 4 para 9(1), (2); the Health and Social Care (Community Health and Standards) Act 2003 s 34, Sch 4 paras 50, 51; and the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 para 16(1), (2)). This does not preclude both medical recommendations being given by practitioners on the staff of the hospital in question if: (1) compliance would involve undesirable delay; and (2) one of the practitioners works at the hospital for less than half of the time which he is bound by contract to devote to work in the health service; and (3) where one of the practitioners is a consultant, the other does not work (whether at the hospital or elsewhere) in a grade in which he is under that consultant's directions: see the Mental Health Act 1983 s 12(4). As to further disqualifications from giving medical recommendations see PARA 483 post. As to NHS foundation trusts generally see HEALTH SERVICES vol 54 (2008) PARA 174 et seq.

The Code of Practice (1999) PARAS 4.1-4.5 gives guidance on the provision of medical recommendations by doctors in private practice.

17 Mental Health Act 1983 s 12(6).

UPDATE

482 Requirements for medical recommendations

NOTES 5, 13--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

TEXT AND NOTES 11-13--A registered medical practitioner who is an approved clinician must be treated as also so approved under the Mental Health Act 1983 s 12(2) as having such special experience: s 12(2A) (added by Mental Health Act 2007 s 16).

NOTE 11--As to the joint making of regulations by the Secretary of State and the Welsh Ministers for approval in relation to both England and Wales see Mental Health Act 1983 s 142A (added by Mental Health Act 2007 s 17). As to the circumstances in which a practitioner approved in England for the purposes of the Mental Health Act 1983 s 12 or a person approved in relation to England to act as an approved clinician for such purposes may be treated as approved in relation to Wales by virtue of that approval, and vice versa see Mental Health (Mutual Recognition) Regulations 2008, SI 2008/1204.

TEXT AND NOTES 14-17--Replaced. No medical recommendation may be given for the purposes of an application mentioned in the Mental Health Act 1983 s 12(1) if the circumstances are such that there would be a potential conflict of interest for the purposes of regulations under s 12A (see PARA 480): s 12(3) (substituted by Mental Health Act 2007 s 22(4)).

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483. Disqualifications from giving medical recommendations for hospital admission.

A medical recommendation for the purposes of an application for admission to hospital¹ may not be given by any of the following persons:

- 9 (1) the applicant²;
- 10 (2) a partner of the applicant or of a practitioner by whom another medical recommendation is given for the purposes of the same application³;
- 11 (3) a person employed as an assistant by the applicant or by any such practitioner as is referred to in head (2) above⁴;
- 12 (4) a person who receives or has an interest in the receipt of any payments made on account of the maintenance of the patient⁵; or
- 13 (5) a practitioner on the staff of the hospital to which the patient is to be admitted if, in the case of the hospital, he is to be admitted as a private patient⁶,

or by the husband, wife, father, father-in-law, mother, mother-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother-in-law, sister or sister-in-law of the patient, or of any of the disqualified persons mentioned above, or of a practitioner by whom another medical recommendation is given for the purposes of the same application⁷.

1 For these purposes, 'hospital' includes a registered establishment: see PARA 417 ante. For the meaning of 'registered establishment' see PARA 421 ante.

2 Mental Health Act 1983 s 12(5)(a). The applicant will be the patient's nearest relative, or the person by whom, by county court order under s 29(1), the functions of the nearest relative are exercisable (see PARAS 453, 456 ante), or an approved social worker (see PARA 451 ante).

3 Ibid s 12(5)(b).

4 Ibid s 12(5)(c).

5 Ibid s 12(5)(d).

6 Ibid s 12(5)(e). This is subject to s 12(3), (4) (as amended) (see PARA 482 ante). The Code of Practice (1999) PARAS 4.1-4.5 gives guidance on private practice and the provision of medical recommendations; in particular, it is undesirable for a doctor to provide a recommendation where he will receive payment from the patient (or a relative or friend or an insurance company) for his medical services after admission (see Code of Practice (1999) PARA 4.3). As to the Code of Practice see PARA 436 ante.

7 Mental Health Act 1983 s 12(5). As from a day to be appointed, s 12(5) is amended so as to refer also to civil partners: see s 12(5) (prospectively amended by the Civil Partnership Act 2004 s 26(1), Sch 27 para 86(a)). At the date at which this volume states the law no such day had been appointed.

UPDATE

483 Disqualifications from giving medical recommendations for hospital admission

NOTE 7--Day now appointed: SI 2005/3175.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(6) GENERAL REQUIREMENTS FOR APPLICATIONS AND MEDICAL RECOMMENDATIONS/484. Medical recommendations for guardianship.

484. Medical recommendations for guardianship.

The general provisions as to medical recommendations for admission for treatment¹ apply also to medical recommendations for guardianship², with the exception of those relating to the giving of one of the necessary recommendations by a medical practitioner on the staff of a hospital³; instead, the person named as guardian in the application is included in the list of persons disqualified for the purposes of giving a medical recommendation⁴.

1 See the Mental Health Act 1983 s 12(7) (applying s 12(1), (2), (5)); and PARA 482 ante.

2 See *ibid* s 7 (see PARA 469 ante). For the forms see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 5(1)(c), Sch 1 Forms 19, 20.

3 See PARA 482 ante.

4 In relation to a guardianship application, the person named as guardian is substituted for the person mentioned in the Mental Health Act 1983 s 12(5)(e) (see PARA 483 head (5) ante): s 12(7). Consequently the relatives of such a person, so far as they are mentioned in s 12(5) (as amended) (see PARA 483 ante), are also disqualified.

UPDATE

484 Medical recommendations for guardianship

NOTE 2--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(6) GENERAL REQUIREMENTS FOR APPLICATIONS AND MEDICAL RECOMMENDATIONS/485. Remuneration of medical practitioners.

485. Remuneration of medical practitioners.

Where a medical practitioner examines any person with a view to an application for his admission to hospital¹ for assessment or treatment being made under Part II of the Mental Health Act 1983², the Secretary of State³ must pay reasonable remuneration to the practitioner in respect of the examination and in respect of any report or recommendation made by him with regard to the person examined and in respect of any expenses reasonably incurred by him for these purposes⁴. No payment may be made under these provisions: (1) where the examination is carried out as part of the practitioner's duty to provide general medical services for the person examined or in the provision of primary medical services for that person⁵; or (2) where the examination is carried out or the report or recommendation is made as part of the practitioner's duty as an officer of an NHS trust, NHS foundation trust, primary care trust, health authority or special health authority⁶. These provisions only apply in a case where it is intended, when the medical examination of the person in question is carried out, that if he is admitted to hospital the whole cost of his maintenance and treatment will be defrayed out of money provided by Parliament⁷.

1 For the meaning of 'hospital' see PARA 417 ante.

2 Ie under the Mental Health Act 1983 Pt II (ss 2-34) (as amended): see PARA 460 et seq ante.

3 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

4 National Health Service Act 1977 s 105(1) (amended by the Mental Health (Amendment) Act 1982 ss 64(4), 65(1), Sch 3 Pt I para 56; and the Mental Health Act 1983 s 148(1), (2), Sch 4 para 47(b)).

5 National Health Service Act 1977 s 105(2)(a) (amended by the National Health Service (Primary Care) Act 1997 s 41(10), Sch 2 para 26; and the Health and Social Care (Community Health and Standards) Act 2003 s 184, Sch 11 paras 7, 37). As to the range of services to be provided by a general practitioner see HEALTH SERVICES vol 54 (2008) PARA 241 et seq.

6 National Health Service Act 1977 s 105(2)(b) (amended by the Health Authorities Act 1995 s 2(1), Sch 1 para 54; the National Health Service Reform and Health Care Professions Act 2002 s 37(1), Sch 8 paras 1, 9; and the Health and Social Care (Community Health and Standards) Act 2003 s 34, Sch 4 paras 23, 39). As to NHS trusts and NHS foundation trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq. For the meanings of 'primary care trust' and 'health authority' see PARA 414 note 6 ante. For the meaning of 'special health authority' see PARA 410 note 10 ante.

7 National Health Service Act 1977 s 105(3) (amended by the Mental Health Act 1983 s 148(1), (3), Sch 4 para 47(c), Sch 6).

UPDATE

485 Remuneration of medical practitioners

TEXT AND NOTES--1977 Act s 105 now as consolidated in National Health Service Act 2006 s 236, National Health Service (Wales) Act 2006 s 181.

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(7) HOSPITAL AND GUARDIANSHIP ORDERS BY CRIMINAL COURTS

486. General effect of the legislation.

The criminal courts¹ have powers under the Mental Health Act 1983² to order that an offender be admitted to hospital or placed under guardianship. If the Crown Court³ finds upon the appropriate medical evidence⁴ that an offender is suffering from mental illness, severe mental impairment, mental impairment or psychopathic disorder⁵ of a nature or degree which warrants hospital treatment, it may authorise by order his admission to and detention in hospital for that purpose⁶, either with or without a restriction order⁷. On appropriate medical evidence that an offender is suffering from mental illness, severe mental impairment, mental impairment or psychopathic disorder and that there is reason to suppose that a hospital order may be appropriate in his case, the court may make an interim hospital order⁸. The Crown Court also has power, upon medical evidence, to remand an accused person to hospital either for a report upon his medical condition⁹ or for medical treatment¹⁰.

A magistrates' court may remand an accused person to hospital for a report, and may make a hospital order¹¹ or interim hospital order on similar evidence, but may not remand an accused person for medical treatment or make a restriction order; an offender may, however, be committed to the Crown Court with a view to that court's making a hospital order accompanied by a restriction order if that court thinks proper¹². In addition, if a magistrates' court is satisfied that the accused did the act or made the omission charged but considers that there ought to be an inquiry into his mental condition, it must adjourn the case for an examination and report to be made and remand him in custody or on bail and in the latter case require the accused to undergo medical examination by two registered medical practitioners¹³ and for that purpose attend any relevant institution or place and comply with relevant directions¹⁴.

Both the Crown Court and a magistrates' court may, on the appropriate medical evidence, make an order placing an offender under the guardianship of a local social services authority¹⁵ or person approved by that authority¹⁶.

Alternatively, the court may deal with the offender in any other suitable manner¹⁷, leaving the local social services authority to make arrangements for his informal or compulsory admission to hospital, reception into guardianship or informal care in the community¹⁸.

1 As to criminal courts see COURTS; CRIMINAL LAW, EVIDENCE AND PROCEDURE; SENTENCING AND DISPOSITION OF OFFENDERS. See also MAGISTRATES.

2 I.e. the Mental Health Act 1983 Pt III (ss 35-55) (as amended): see the text and PARA 487 et seq post.

3 As to the Crown Court see COURTS vol 10 (Reissue) PARA 621 et seq.

4 As to the general requirements for medical evidence see PARA 492 post.

5 For the meanings of these terms see PARAS 402-403 ante.

When imposing a prison sentence on an offender who is suffering from a psychopathic disorder with or without an additional category of mental disorder, the court may direct that he should be detained in hospital and subject to special conditions: see the Mental Health Act 1983 ss 45A, 45B (both as added and amended); and PARA 490 post. See also Home Office Circular 52/97.

6 See the Mental Health Act 1983 s 37(1), (2) (as amended); and PARA 502 post. These orders are referred to as 'hospital orders': see s 37(4) (as amended), s 145(1); and PARA 491 post. As to hospital orders see PARA 491 et seq post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 332.

A conditionally discharged patient may be lawfully detained under the Mental Health Act 1983 s 3, notwithstanding that he remains liable to detention under s 37 (as amended): *R v North West London Mental Health NHS Trust, ex p Stewart* [1998] QB 628, [1997] 4 All ER 871, CA.

7 le under the Mental Health Act 1983 s 41(1). As to restriction orders see PARA 496 et seq post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 337.

8 Ibid s 38(1). As to interim hospital orders see PARA 491 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 334.

9 Ibid s 35(1). As to the meaning of 'medical treatment' see PARA 552 post. As to remand to hospital for report see PARA 489 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 335.

10 Ibid s 36(1). As to remand to hospital for treatment see PARA 489 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 336.

11 In certain circumstances, it may do so without convicting: see *ibid* s 37(3); and PARA 491 post.

12 See *ibid* s 37(1) (as amended), s 43(1); and PARA 502 post. As to committal to the Crown Court for a restriction order see PARA 498 post.

13 For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.

14 See the Powers of Criminal Courts (Sentencing) Act 2000 s 11; and CRIMINAL LAW, EVIDENCE AND PROCEDURE.

15 As to the local social services authority see PARA 424 ante.

16 See the Mental Health Act 1983 s 37(1) (as amended); and PARA 502 post. Such orders are referred to as 'guardianship orders': see ss 37(6), 145(1). As to guardianship orders see PARAS 502-503 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 332.

17 In any case where the offender is or appears to be mentally disordered, depending on the circumstances the court has duties to consider a medical report, any other relevant information relating to his mental condition and the likely effect of any sentence on any condition or treatment before passing a custodial sentence other than one fixed by law: see the Criminal Justice Act 2003 s 157; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 627.

18 Guidance on provision for mentally disordered offenders is given in Home Office Circular 66/90. Its purpose is to draw the attention of the courts and those services responsible for dealing with mentally disordered persons who commit, or are suspected of committing, criminal offences to: (1) the legal powers which exist; and (2) the desirability of ensuring effective co-operation between agencies to ensure that the best use is made of resources and that mentally disordered persons are not prosecuted where this is not required by the public interest. See also Home Office Circular 12/95. See also the Code for Crown Prosecutors (2004) which sets out factors for and against the prosecution of mentally disordered offenders and the circumstances in which the Crown Prosecution Service will consider diversion out of the criminal justice system.

UPDATE

486 General effect of the legislation

TEXT AND NOTE 10--The Crown Court must also be satisfied that appropriate medical treatment is available for the accused person: Mental Health Act 1983 s 36(1) (amended by Mental Health Act 2007 s 5(2)).

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487. Effect of hospital orders, guardianship orders and interim hospital orders.

Where an offender is admitted to hospital¹ or placed under guardianship by virtue of a hospital order, a guardianship order or an order or direction having the same effect as such orders², he must be treated for the purpose of the general statutory provisions relating to compulsory admission or guardianship³ as if on the date of the order he had been admitted or placed in pursuance of an application for admission for treatment or a guardianship application⁴, but with some exceptions and modifications⁵. These exceptions and modifications are different in the case of hospital orders without restriction orders⁶, guardianship orders⁷ and orders or directions⁸ having the same effect⁹, from those in the case of hospital orders with restriction orders¹⁰ and orders or directions¹¹ having the same effect¹². This provision¹³ does not apply¹⁴ to offenders who are admitted to hospital pursuant to a remand for report¹⁵ or for treatment¹⁶ or an interim hospital order¹⁷.

1 For the meaning of 'hospital' see PARA 417 ante.

2 As to such orders and directions see PARA 488 post.

3 Ie the provisions set out in the Mental Health Act 1983 Sch 1 (as amended).

4 Ie under ibid Pt II (ss 2-34) (as amended).

5 See ibid ss 40(4), 41(3), (5), 55(4), Sch 1 (as amended); and notes 9, 12 infra. Further, in relation to a person who is liable to be detained or subject to guardianship by virtue of an order or direction under Pt III (ss 35-55) (as amended) (other than under s 35 (remand to hospital for report: see PARA 489 post), s 36 (remand to hospital for treatment: see PARA 489 post) or s 38 (interim hospital orders: see PARA 491 post)), any reference in the Act to any enactment contained in Pt II (as amended) or in s 66 or s 67 (as amended) (see PARA 564 et seq post) is to be construed as a reference to that enactment as it applies to that person by virtue of Pt III (as amended): s 145(3).

6 Ie orders having effect under ibid ss 37, 40 (as amended): see PARAS 491-495 post.

7 Ie orders having effect under ibid ss 37, 40 (as amended): see PARAS 502-503 post.

8 As to such orders and directions generally see PARA 488 post.

9 In these cases: (1) the following provisions of the Mental Health Act 1983 apply without modification: s 9 (regulations as to guardianship: see PARA 474 ante); s 10 (transfer of guardianship: see PARAS 478-479 ante); s 17 (as amended) (leave of absence from hospital: see PARA 506 post); s 21 (as substituted) and ss 21A, 21B (both as added) (special provisions as to patients absent without leave: see PARA 521 post); s 24(3), (4) (as amended) (visiting and examination of patients and inspection of records: see PARA 526 post); ss 25C-25J (as added and amended) (after-care under supervision: see PARA 529 et seq post); s 26 (as amended) (definition of 'relative': see PARA 452 ante); s 27 (as substituted) (children and young persons in care: see PARA 453 ante); s 28 (as amended) (nearest relative of a minor under guardianship: see PARA 453 ante); s 31 (procedure on application to a county court: see PARA 459 ante); s 32 (as amended) (power to make regulations: see PARA 442 ante); s 34 (as amended) (interpretation); s 67 (as amended) (power of the Secretary of State to refer to a mental health review tribunal: see PARA 568 post); s 76 (as amended) (visiting and examination of patients: see PARA 566 post); (2) the following provisions apply with modification: s 16 (reclassification of patients: see PARA 527 post); s 18 (as amended) (return and readmission of patients absent without leave: see PARA 507 post); s 19 (as amended) (regulations as to transfer of patients: see PARAS 511-514 post); s 20 (duration of authority: see PARAS 518-520 post); s 22 (as amended) (special provisions as to patients sentenced etc: see PARA 522 post); s 23 (as amended) (discharge of patients: see PARA 523 post); ss 25A-25B (as added and amended) (after-care under supervision: see PARAS 528-529 post); s 66 (as amended) (applications to tribunals: see PARA 564 post); and (3) the remaining provisions of Pt II (as amended) do not apply: see the Mental Health Act 1983 s 40(4), Sch 1 Pt I (amended by the Mental Health (Patients in the Community) Act 1995 ss 1(2), 2(8), Sch 1 paras 6, 14).

10 le orders having effect under *ibid* s 41 (as amended): see PARA 496 post.

11 As to such orders and directions generally see PARA 488 post.

12 In these cases: (1) the following provisions apply without modification: s 24(3), (4) (as amended) (visiting and examination of patients and inspection of records: see PARA 526 post); s 32 (as amended) (regulations: see PARA 442 ante); s 76 (as amended) (visiting and examination of patients and inspection of records: see PARAS 526, 566 post); (2) the following provisions apply with modification: s 17 (as amended) (leave of absence: see PARA 506 post); s 18 (as amended) (return and readmission of patients absent without leave: see PARA 507 post); s 19 (as amended) (regulations as to transfer of patients: see PARAS 511-514 post); s 22 (as amended) (special provisions as to patients sentenced to imprisonment etc: see PARA 522 post); s 23 (as amended) (discharge of patients: see PARA 523 post); s 34 (as amended) (definitions); and (3) the remaining provisions of Pt II (as amended) do not apply: see the Mental Health Act 1983 ss 40(4), 41(3), (5) (s 41(3) amended by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 5; and the Crime (Sentences) Act 1997 s 49(2)); and the Mental Health Act 1983 Sch 1 Pt II (amended by the Mental Health (Patients in the Community) Act 1995 s 3(2); and the Crime (Sentences) Act 1997 ss 49(4), 56(2), Sch 6).

13 le the Mental Health Act 1983 s 40(4).

14 le because the provisions listed do not provide that remands and orders made under them are to have the same effect as a hospital order; they are not, therefore, included in *ibid* s 40(4) by virtue of s 55(4). See also note 5 *supra*.

15 le under *ibid* s 35: see PARA 489 post.

16 le under *ibid* s 36: see PARA 489 post.

17 le under *ibid* s 38 (as amended): see PARA 491 post.

UPDATE

487 Effect of hospital orders, guardianship orders and interim hospital orders

NOTE 9--Mental Health Act 1983 Sch 1 Pt I further amended: Mental Health Act 2007 s 37(6), Sch 3 para 36.

NOTE 12--Mental Health Act 1983 Sch 1 Pt II further amended: Mental Health Act 2007 Sch 3 para 37.

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488. Effect of transfer and restriction directions.

Transfer directions by the Secretary of State¹ for the removal to hospital² of persons serving sentences, or other prisoners³, have the same effect as hospital orders⁴ made in such cases⁵. Restriction directions by the Secretary of State restricting the discharge of prisoners removed to hospital⁶ have the same effect as restriction orders⁷ made in such cases⁸. Orders by magistrates' courts directing persons to be admitted to and detained in hospital instead of committing them in custody with a view to a restriction order being made⁹ have the same effect as hospital orders together with restriction orders¹⁰, made without limitation of time¹¹.

Any reference to a hospital order, guardianship order or a restriction order in the provisions of the Mental Health Act 1983 dealing with:

- 14 (1) the effects of hospital orders (but not interim hospital orders) and guardianship orders, other than the provision conferring initial authority to convey the patient and admit him to hospital¹²;
- 15 (2) the effects of restriction orders¹³;
- 16 (3) the powers of the Secretary of State in respect of patients subject to restriction orders¹⁴; and
- 17 (4) rights of application to tribunals¹⁵,

must be construed as including references to any order or direction¹⁶ having the same effect as such orders¹⁷.

Patients detained pursuant to orders or directions in other parts of the United Kingdom¹⁸ who are removed and admitted to hospitals in England¹⁹ and Wales²⁰ are to be treated as if admitted in pursuance of an order or direction made on the date of their admission under the corresponding enactment in England and Wales²¹.

1 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

2 For the meaning of 'hospital' see PARA 417 ante.

3 I.e. directions under the Mental Health Act 1983 ss 47, 48 (as amended): see PARAS 535-536 post.

4 See *ibid* s 55(4); and note 17 *infra*.

5 *Ibid* ss 47(3), 48(3).

6 I.e. directions under *ibid* s 49(1): see PARA 537 post.

7 I.e. orders made under *ibid* s 41 (as amended): see PARA 496 post.

8 *Ibid* s 49(2).

9 I.e. orders under *ibid* s 44: see PARA 498 post; and MAGISTRATES vol 29(2) (Reissue) PARA 779.

10 I.e. orders made under *ibid* s 41 (as amended): see PARA 496 post.

11 *Ibid* s 44(3). See notes 9-10 *supra*. Where there is no space immediately available, the court can make directions to convey the person to a place of safety: see s 37(5); and PARA 495 post.

- 12 le under ibid s 40(2), (4), (5): see PARAS 494, 502-503 post.
- 13 le under ibid s 41(3)-(5) (as amended): see PARAS 496-497 post.
- 14 le under ibid s 42: see PARAS 501, 524 post.
- 15 le under ibid s 69(1): see PARA 564 post.
- 16 le under ibid Pt III (ss 35-55) (as amended).
- 17 Ibid s 55(4). The exceptions and modifications set out in Sch 1 (as amended) (see PARA 487 text and notes 9, 12 ante) accordingly include those which are consequential on this provision: s 55(4).
- 18 For the meaning of 'United Kingdom' see PARA 406 note 18 ante.
- 19 For the meaning of 'England' see PARA 405 note 6 ante.
- 20 For the meaning of 'Wales' see PARA 405 note 7 ante.
- 21 See the Mental Health Act 1983 s 82 (as amended), s 85(2); the Mental Health (Care and Treatment) (Scotland) Act 2003 ss 289, 290; the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9); and PARAS 543, 545-546 post.

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489. Remand to hospital for report or for treatment.

The Crown Court¹ or a magistrates' court² may remand an accused person³ to a hospital⁴ specified by the court for a report on his mental condition if: (1) the court is satisfied, on the evidence of a registered medical practitioner⁵, that there is reason to suspect that he is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment⁶; and (2) the court is of the opinion that it would be impracticable for a report on his mental condition to be made if he were remanded on bail⁷.

The Crown Court may, instead of remanding an accused person⁸ in custody, remand him to a hospital specified by the court if satisfied, on the written or oral evidence of two registered medical practitioners⁹, that he is suffering from mental illness or severe mental impairment of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment¹⁰.

The court must not remand an accused person to hospital for report¹¹ or for treatment¹² unless it is satisfied, on the written or oral evidence of the registered medical practitioner who would be responsible for making the report or in charge of his treatment, or of some other person representing the managers¹³ of the hospital, that arrangements have been made for his admission to that hospital within the period of seven days beginning with the date of the remand¹⁴. If the court is so satisfied, it may give directions for his conveyance to and detention in a place of safety¹⁵ pending his admission to hospital¹⁶.

Where a court has remanded an accused person to hospital for report or for treatment, it may further remand him¹⁷ if it appears to the court: (a) on the written or oral evidence of the registered medical practitioner responsible for making the report, that a further remand is necessary for the purpose of completing the assessment of the accused person's mental condition¹⁸; or (b) on the written or oral evidence of the responsible medical officer¹⁹, that a further remand is warranted²⁰.

An accused person may not be remanded for report or for treatment for more than 28 days at a time or for more than 12 weeks in all and the court may at any time terminate the remand if it appears to the court appropriate to do so²¹. A person remanded to hospital is entitled to obtain at his own expense an independent report on his mental condition from a registered medical practitioner chosen by him and to apply on the basis of that report for his remand to be terminated²².

If an accused person remanded for report or for treatment absconds from the hospital to which he has been remanded, or while being conveyed to or from that hospital, he may be arrested without warrant by any constable²³ and must as soon as practicable thereafter be brought before the court which remanded him, which may thereupon terminate the remand and deal with him in any way in which it could have dealt with him had he not been remanded to hospital under these provisions²⁴.

Remands to hospital under these provisions do not have the same effect as hospital orders²⁵, nor are the persons remanded to be treated as if a hospital order had been made²⁶. Accordingly, the other provisions of the Mental Health Act 1983 which apply to hospital order patients do not apply to them²⁷. The provisions of the Act concerning consent to treatment apply to persons remanded for treatment, but not to those remanded for report²⁸.

- 1 As to the Crown Court see COURTS vol 10 (Reissue) PARA 621 et seq.
- 2 As to magistrates' courts see MAGISTRATES vol 29(2) (Reissue) PARA 583 et seq.
- 3 For these purposes, 'accused person' means: (1) in relation to the Crown Court, any person who is awaiting trial before the court for an offence punishable with imprisonment or who has been arraigned before the court for such an offence and has not yet been sentenced or otherwise dealt with for that offence, but not a person who has been convicted before the court if the sentence for the offence for which he has been convicted is fixed by law; and (2) in relation to a magistrates' court, any person who has been convicted by the court of an offence punishable on summary conviction with imprisonment and any person charged with such an offence if the court is satisfied that he did the act or made the omission charged or has consented to the exercise by the court of the powers conferred by the Mental Health Act 1983 s 35: s 35(2), (3).
- 4 For the meaning of 'hospital', which does not include a prison hospital, see PARA 417 ante. The Code of Practice (1999) PARA 29.6 gives guidance on the responsibility of the hospital to return the patient to court as required and on providing a suitable escort for him. As to the Code of Practice see PARA 436 ante.
- 5 The registered medical practitioner (see PARA 460 note 13 ante) must be approved for the purposes of the Mental Health Act 1983 s 12 (as amended) (see PARA 482 ante): see s 54(1) (as amended); and PARA 492 post.
- 6 For the meanings of these terms see PARAS 402-403 ante. For guidance on assessment admissions see Code of Practice (1999) PARAS 3.1-3.21; and as to the contents of reports see Code of Practice (1999) PARA 3.11.
- 7 Mental Health Act 1983 s 35(1), (3). As to bail generally see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1165 et seq. As to the corresponding powers in the Criminal Courts (Sentencing) Act 2000 s 11 and the Criminal Justice Act 2003 s 157 see PARA 486 ante.
- 8 For these purposes, 'accused person' means any person who is in custody awaiting trial before the Crown Court for an offence punishable with imprisonment (other than an offence the sentence for which is fixed by law) or who at any time before sentence is in custody in the course of a trial before that court for such an offence: Mental Health Act 1983 s 36(2).
- 9 One of those practitioners must be approved for the purposes of *ibid* s 12 (as amended) (see PARA 482 ante): see s 54(1) (as amended); and PARA 492 post.
- 10 *Ibid* s 36(1). As to the meaning of 'medical treatment' see PARA 552 post. See also CRIMINAL LAW, EVIDENCE AND PROCEDURE. The alternative of a remand in custody during which the Secretary of State may exercise his power to direct a transfer to hospital under s 48 (as amended) (see PARA 536 post) may in certain circumstances (eg if the trial is to be long delayed) be more appropriate.
- 11 *Ie* under *ibid* s 35(1): see the text and note 7 *supra*.
- 12 *Ie* under *ibid* s 36(1): see the text and note 10 *supra*.
- 13 For the meaning of 'managers' see PARA 439 ante.
- 14 Mental Health Act 1983 ss 35(4), 36(3). See *R (on the application of Bitcon) v West Allerdale Magistrates' Court* [2003] EWHC 2460 (Admin), [2003] All ER (D) 33 (Sep) (confirmation that the court was correct to revoke its own order under the Mental Health Act 1983 s 35 as being *ultra vires* when funding fell through and arrangements for admission could not be fulfilled; advice given on the procedure to be undertaken before an order is made under s 35).
- 15 For the meaning of 'place of safety' for this purpose see PARA 495 note 4 post.
- 16 Mental Health Act 1983 ss 35(4), 36(3). Where a person is remanded under s 35 or s 36, a constable or other person directed to do so by the court must convey the person to the hospital within the seven day period and the managers must admit him within that period and thereafter detain him in accordance with the relevant provision: ss 35(9), 36(8). Ensuring production of the patient at subsequent court appearances is the responsibility of hospital managers: see Home Office Circular 71/84.
- 17 The power of further remand may be exercised without bringing the accused before the court if he is represented by counsel or solicitor and his counsel or solicitor is given an opportunity of being heard: Mental Health Act 1983 ss 35(6), 36(5).
- 18 *Ibid* s 35(5).

19 In *ibid* Pt III (ss 35-55) (as amended), the 'responsible medical officer' is the registered medical practitioner in charge of the patient's treatment: s 55(1). For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.

20 *Ibid* s 36(4).

21 *Ibid* ss 35(7), 36(6). As to the powers of the relevant judicial authority (following breach of orders) to remand in custody under the Family Law Act 1996 for medical reports where there is reason to suspect mental illness or severe mental impairment see s 48; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 994.

22 Mental Health Act 1983 ss 35(8), 36(7).

23 As to the office of constable see POLICE vol 36(1) (2007 Reissue) PARA 101 et seq.

24 Mental Health Act 1983 ss 35(10), 36(8).

25 As to hospital orders see PARA 491 et seq post.

26 Cf the provisions discussed in PARA 488 ante.

27 Cf para 487 ante.

28 See PARA 551 post. As it is clear that a remand for report gives no power to impose medical treatment without consent, *quaere* whether there is power to make an application for admission for treatment under the Mental Health Act 1983 s 3 (see PARA 461 ante) during the period of the remand. Part II (ss 2-34) (as amended) and Pt III (ss 35-55) (as amended) can co-exist and operate independently of each other; and see *Dlodlo v Mental Health Review Tribunal for the South Thames Region* (1996) 36 BMLR 145, CA. See also Code of Practice (1999) PARA 17.3. As to the Code of Practice see PARA 436 ante.

UPDATE

489 Remand to hospital for report or for treatment

TEXT AND NOTES--References are now to a registered medical practitioner or approved clinician: Mental Health Act 1983 ss 35(4), (5), (8), 36(3), (4), (7) (amended by Mental Health Act 2007 s 10(2), (3)).

TEXT AND NOTES 8-10--The Crown Court must also be satisfied that appropriate medical treatment is available for the accused person: Mental Health Act 1983 s 36(1) (amended by Mental Health Act 2007 s 5(2)).

NOTE 17--References to counsel or solicitor now to an authorised person: Mental Health Act 1983 ss 35(6), 36(5) (amended by Legal Services Act 2007 Sch 21 paras 54, 55). 'Authorised person' means a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience (within the meaning of that Act) (see LEGAL PROFESSIONS vol 68 (2008) para 412): Mental Health Act 1983 s 55(1) (definition added by Legal Services Act 2007 Sch 21 para 59).

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490. Hospital and limitation directions.

Where, in the case of a person convicted before the Crown Court² of an offence the sentence for which is not fixed by law: (1) the court is satisfied, on the written or oral evidence of two registered medical practitioners³, that: (a) the offender is suffering from psychopathic disorder³; (b) the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital⁴ for medical treatment; and (c) such treatment is likely to alleviate or prevent a deterioration of his condition⁵; and (2) the court considers making a hospital order in respect of him before deciding to impose a sentence of imprisonment ('the relevant sentence') in respect of the offence⁶, the court may give both of the following directions⁷. It may give a direction that, instead of being removed to and detained in a prison, the offender be removed to and detained in such hospital as may be specified in the direction (a 'hospital direction')⁸, and a direction that the offender be subject to special restrictions (a 'limitation direction')⁹.

A hospital direction and a limitation direction must not be given in relation to an offender unless at least one of the medical practitioners whose evidence is taken into account by the court has given evidence orally before the court¹⁰. A hospital direction and a limitation direction must not be given in relation to an offender unless the court is satisfied on the written or oral evidence of the registered medical practitioner¹¹ who will be in charge of his treatment, or of some other person representing the managers¹² of the hospital that arrangements have been made for his admission to that hospital, and for his admission to it within the period of 28 days beginning with the day of the giving of such directions¹³. Pending his admission within that period, the court may give such directions as it thinks fit for his conveyance to and detention in a place of safety¹⁴. If within that period of 28 days it appears to the Secretary of State that by reason of an emergency or other special circumstances it is not practicable for the patient¹⁵ to be received into the hospital specified in the hospital direction, he may give instructions for the admission of the patient to such other hospital as appears to be appropriate instead of the hospital so specified¹⁶. Where such instructions are given, the Secretary of State must cause the person having the custody of the patient to be informed, and the hospital direction has effect as if the hospital specified in the instructions were substituted for the hospital specified in the hospital direction¹⁷.

A hospital direction and a limitation direction given in relation to an offender have effect not only as regards the relevant sentence but also (so far as applicable) as regards any other sentence of imprisonment imposed on the same or a previous occasion¹⁸.

A hospital direction and a limitation direction are sufficient authority for a constable¹⁹ or any other person directed to do so by the court to convey the patient to the hospital specified in the hospital direction within a period of 28 days, and for the managers of the hospital to admit him at any time within that period and thereafter detain him under the Mental Health Act 1983²⁰.

With respect to any person, a hospital direction has effect as a transfer direction²¹, and a limitation direction has effect as a restriction direction²². While a person is subject to a hospital direction and a limitation direction, the responsible medical officer must, at such intervals (not exceeding one year) as the Secretary of State may direct, examine and report to the Secretary of State on that person; and every report must contain such particulars as the Secretary of State may require²³.

- 1 As to the Crown Court see COURTS vol 10 (Reissue) PARA 621 et seq.
- 2 For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.
- 3 The Secretary of State may by order provide that the Mental Health Act 1983 s 45A (as added and amended) is to have effect as if the reference to psychopathic disorder included a reference to a mental disorder of such other description as may be specified in the order: s 45A(10), (11) (s 45A added by the Crime (Sentences) Act 1997 s 46). As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante. For the meaning of 'psychopathic disorder' see PARA 403 ante. For the meaning of 'mental disorder' see PARA 402 ante. The purpose of the power in the Mental Health Act 1983 s 45A (as added and amended), which is rarely used, is explained in Home Office Circular 52/97.
- 4 For the meaning of 'hospital' see PARA 417 ante.
- 5 Mental Health Act 1983 s 45A(1)(a), (2) (as added: see note 3 supra). As to the meaning of 'medical treatment' see PARA 552 post.
- 6 Ibid s 45A(1)(b) (as added (see note 3 supra); and amended by the Criminal Justice Act 2003 ss 304, 332, Sch 32 Pt I paras 37, 39, Sch 37 Pt 7).
- 7 Mental Health Act 1983 s 45A(3) (as added: see note 3 supra).
- 8 Ibid s 45A(3)(a) (as added: see note 3 supra); s 145(1) (definition added by the Crime (Sentences) Act 1997 s 56, Sch 4 para 12(19)(a)). Any power to specify a hospital conferred by the Mental Health Act 1983 s 45A (as added) includes power to specify a hospital unit; and where such a unit is specified in relation to any person in the exercise of such a power, any reference in any enactment (including one contained in the Crime (Sentences) Act 1997) to him being, or being liable to be, detained in a hospital must be construed accordingly: s 47(1)(b).
- 9 Mental Health Act 1983 s 45A(3)(b) (as added: see note 3 supra); s 145(1) (definition added by the Crime (Sentences) Act 1997 Sch 4 para 12(19)(b)). Reference is made in the Mental Health Act 1983 s 45A(3)(b) (as added) to the special restrictions set out in s 41 (as amended) (see PARA 496 post).
- 10 Ibid s 45A(4) (as added: see note 3 supra).
- 11 For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.
- 12 For the meaning of 'managers' see PARA 439 ante.
- 13 Mental Health Act 1983 s 45A(5) (as added: see note 3 supra).
- 14 See note 13 supra.
- 15 For the meaning of 'patient' see PARA 435 ante.
- 16 Mental Health Act 1983 s 45A(6) (as added: see note 3 supra).
- 17 Ibid s 45A(7) (as added: see note 3 supra).
- 18 Ibid s 45A(9) (as added: see note 3 supra).
- 19 As to the office of constable see POLICE vol 36(1) (2007 Reissue) PARA 101 et seq.
- 20 Mental Health Act 1983 s 45B(1) (s 45B added by the Crime (Sentences) Act 1997 s 46).
- 21 As to transfers see PARA 535 post.
- 22 Mental Health Act 1983 s 45B(2) (as added: see note 20 supra). As to restriction directions see PARA 537 post.
- 23 Ibid s 45B(3) (as added: see note 20 supra).

UPDATE

490 Hospital and limitation directions

TEXT AND NOTES 2-5--In head (a) reference to psychopathic disorder is now to mental disorder; and now, head (c) appropriate medical treatment (see PARA 461) is available for him: Mental Health Act 1983 s 45A(2) (amended by Mental Health Act 2007 s 4(6), Sch 1 para 9).

NOTE 3--Mental Health Act 1983 s 45A(10), (11) repealed: Mental Health Act 2007 Sch 11 Pt 1. See *R v Staines* [2006] EWCA Crim 15, [2006] 2 Cr App Rep (S) 376.

NOTE 13--Mental Health Act 1983 s 45A(5) amended: Mental Health Act 2007 s 10(8).

NOTE 23--Mental Health Act 1983 s 45B(3) amended: Mental Health Act 2007 s 10(9)(a).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(7) HOSPITAL AND GUARDIANSHIP ORDERS BY CRIMINAL COURTS/491. Hospital orders and interim hospital orders.

491. Hospital orders and interim hospital orders.

Where a person is convicted before the Crown Court¹ of an offence punishable with imprisonment², or is convicted by a magistrates' court³ of an offence punishable on summary conviction with imprisonment⁴, the court may make an order (a 'hospital order')⁵ authorising his admission to and detention in a hospital⁶ specified⁷ in the order, if the following conditions are fulfilled⁸:

- 18 (1) the court is satisfied on the written or oral evidence of two registered medical practitioners⁹ that the offender is suffering from mental illness, psychopathic disorder, mental impairment or severe mental impairment¹⁰, and that the mental disorder¹¹ is of a nature or degree which warrants the detention of the patient in a hospital for medical treatment¹²; and, in the case of psychopathic disorder or mental impairment, the court is also satisfied that detention and treatment in hospital is likely to alleviate or prevent a deterioration in the patient's condition¹³; and
- 19 (2) the court is of the opinion, having regard to all the circumstances, including the nature of the offence and the character and antecedents of the offender and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of a hospital order¹⁴.

The object of the order, where punishment is not intended, is that the defendant should receive treatment and be at large as soon as he can safely be discharged¹⁵ and the matter should not be left to be dealt with by the Secretary of State under his powers of removal to a hospital of a person under sentence¹⁶.

A hospital order must specify the form or forms of mental disorder from which, on the evidence of the two medical practitioners concerned, the offender is found by the court to be suffering; and no order may be made unless the offender is described by each of those practitioners as suffering from the same one of those forms of mental disorder, whether or not he is also described by either of them as suffering from another of those forms¹⁷.

Where a person is so convicted¹⁸, the court may, before making a hospital order or dealing with him in some other way, make an order (an 'interim hospital order')¹⁹ authorising his admission to and detention in a hospital specified by the court, if the court is satisfied²⁰ that the offender is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment and that there is reason to suppose that the mental disorder from which the offender is suffering is such that it may be appropriate for a hospital order to be made in his case²¹. An interim hospital order is in force for the period, not exceeding 12 weeks, which is specified by the court when making the order, but may be renewed²², on the written or oral evidence of the responsible medical officer²³ that its continuation is warranted, for further periods of not more than 28 days at a time²⁴. However, no such order can be in force for more than 12 months in all and the court must terminate the order if it makes a hospital order²⁵ or decides²⁶ to deal with the offender in some other way²⁷.

No hospital order or interim hospital order may be made unless the court is satisfied, on the written or oral evidence of the medical practitioner who would be in charge of the offender's treatment or of some other person representing the managers of the hospital²⁸, that arrangements have been made for the admission of the offender to that hospital, and for that

admission to take place within a period of 28 days beginning with the date of the making of the order²⁹.

Where a court is minded to make a hospital order or an interim hospital order, it may request the primary care trust³⁰ or health authority³¹ for the area in which the person concerned resides or last resided, or any other primary care trust or health authority that appears to it to be appropriate, to furnish the court with information with respect to the hospital or hospitals, if any, in its area or elsewhere at which arrangements could be made for the admission of that person in pursuance of the order; the primary care trust or health authority must comply with such a request³².

1 As to the Crown Court see COURTS vol 10 (Reissue) PARA 621 et seq.

2 Ie other than an offence the sentence for which is fixed by law.

In the case of an offence the sentence for which would otherwise fall to be imposed:

9 (1) under the Firearms Act 1968 s 51A(2) (as added) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 664);

10 (2) under the Powers of Criminal Courts (Sentencing) Act 2000 s 110(2) (prospectively amended) or s 111(2) (prospectively amended) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 294); or

11 (3) under any of the Criminal Justice Act 2003 ss 225-228 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 73-75, 82, 84),

nothing in those provisions prevents a court from making an order under the Mental Health Act 1983 s 37(1) (as amended) for the admission of the offender to a hospital: s 37(1A) (s 37(1A), (1B) added by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 37, 38(b)). References in the Mental Health Act 1983 s 37(1A) (as added) to a sentence falling to be imposed under any of the provisions there mentioned are to be read in accordance with the Criminal Justice Act 2003 s 305(4) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 19): Mental Health Act 1983 s 37(1B) (as so added).

For guidance on the Secretary of State's jurisdiction to decide whether to treat a prisoner as if he had been made the subject of a hospital order under the Mental Health Act 1983 s 37 (as amended) and as to the possible effects of 'technical lifer' status see *R (on the application of R) v Shetty and Secretary of State for the Home Department* [2003] EWHC 3152 (Admin), [2003] All ER (D) 243 (Dec). As to 'technical lifer' status see PARA 537 note 8 post.

3 Where a magistrates' court would have power, on convicting a person charged with any act or omission as an offence, to make a hospital order in his case as being a person suffering from mental illness or severe mental impairment (ie not merely mental impairment nor psychopathic disorder) (see PARAS 402-403 ante), it may, if satisfied that he did the act or made the omission charged, make a hospital order without convicting him: Mental Health Act 1983 s 37(3). See *R v Lincolnshire (Kesteven) Justices, ex p O'Connor* [1983] 1 All ER 901, [1983] 1 WLR 335, DC; *R v Ramsgate Justices, ex p Kazmarek* (1984) 80 Cr App Rep 366, DC; *R v Chippenham Magistrates' Court, ex p Thompson* (1996) 32 BMLR 69. As to appeals against such orders see PARA 505 post.

There is no power to make an interim hospital order without a conviction and therefore it is not available where there has been a finding that the accused did the act or made the omission charged: see *R (on the application of Bartram) v Southend Magistrates' Court* [2004] All ER (D) 326 (Oct).

Where the defendant was or might be mentally ill or suffering from severe mental impairment, the appropriate procedure is a combination of the Mental Health Act 1983 s 37(3) and the Powers of Criminal Courts (Sentencing) Act 2000 s 11(1) (see MAGISTRATES vol 29(2) (Reissue) PARA 723): *R (on the application of P) v Barking Youth Court* [2002] EWHC 734 (Admin), [2002] 2 Cr App Rep 294.

4 The reference to an offence punishable on summary conviction with imprisonment must be construed without regard to any prohibition or restriction imposed by or under any enactment on the imprisonment of young offenders: Mental Health Act 1983 s 55(2).

5 Ibid s 37(4). 'Hospital order' has the meaning given in s 37 (as amended) (see ss 37(4), 145(1)), and includes a reference to any order or direction having the same effect (see s 55(4)). The order constitutes the authority for the patient's admission to and detention in hospital: see s 40(1); and PARA 494 post. A hospital order may be made for admission to a hospital in any part of the country where a vacancy exists: *R v Marsden*

[1968] 2 All ER 341, [1968] 1 WLR 785, CA. For the documents required to be sent by the court to the hospital see the Criminal Procedure Rules 2005, SI 2005/384, r 49.2; and MAGISTRATES.

6 In the Mental Health Act 1983 Pt III (ss 35-55) (as amended), 'hospital' includes a registered establishment unless the contrary is stated (eg as in s 47(1) (as amended): see PARA 535 et seq post): see PARA 417 ante.

7 Any power to specify a hospital conferred by the Mental Health Act 1983 s 37 (as amended) includes power to specify a hospital unit; and where such a unit is specified in relation to any person in the exercise of such a power, any reference in any enactment (including one contained in the Crime (Sentences) Act 1997) to him being, or being liable to be, detained in a hospital is to be construed accordingly but this does not apply unless the court also makes an order under the Mental Health Act 1983 s 41 (as amended) (see PARA 496 post): Crime (Sentences) Act 1997 s 47(1)(a), (2)(a).

8 Mental Health Act 1983 s 37(1) (amended by the Crime (Sentences) Act 1997 s 55, Sch 4 para 12(1); and the Criminal Justice Act 2003 Sch 32 Pt 1 paras 37, 38(a)).

As to the power of the courts to make hospital orders in the case of persons committed for trial or sentence who have been transferred to hospital by direction under the Mental Health Act 1983 s 48(2)(a) (prospectively amended) (see PARA 536 post) where it is impracticable or inappropriate to bring them before the court see s 51(5)(b), (6); and PARA 539 post. As to the duty of the court to make appropriate orders after a special verdict or findings of disability see the Criminal Procedure (Insanity) Act 1964 s 5 (as substituted), s 5A (as added); para 499 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 332 et seq. As to the power of civil courts to make hospital orders in committal proceedings for contempt of court see the Contempt of Court Act 1981 s 14(4) (as amended); and CONTEMPT OF COURT vol 9(1) (Reissue) PARAS 505, 509.

See *A v Harrow Crown Court* [2003] EWHC 2020 (Admin), [2003] All ER (D) 78 (Aug); *R (on the application of G) v Mental Health Review Tribunal* [2004] EWHC 2193 (Admin), [2004] All ER (D) 86 (Oct); *R (on the application of the Secretary of State for the Home Department) v Mental Health Review Tribunal* [2004] EWHC 2194 (Admin), [2004] All ER (D) 87 (Oct). See also *R v Galfetti* [2002] EWCA Crim 1916, [2002] All ER (D) 521 (Jul) (judge not wrong in principle to impose an order nine months after conviction after excessive delay by the health authorities in providing a hospital place).

9 One of the registered medical practitioners must be approved for the purposes of the Mental Health Act 1983 s 12 (as amended): see s 54(1) (as amended); and PARA 492 post.

The preconditions for s 37 (as amended) are up-to-date medical assessments so that the court is satisfied as to the offender's current medical condition and susceptibility to treatment: *R v Preston* [2003] EWCA Crim 2086.

10 For the meanings of these terms see PARAS 402-403 ante.

11 For the meaning of 'mental disorder' see PARA 402 ante.

12 Mental Health Act 1983 s 37(2)(a). As to the meaning of 'medical treatment' see PARA 552 post. For the treatment which may be given see PARAS 551, 553-558 post.

13 Ibid s 37(2)(a)(i). As to guardianship orders see s 37(2)(a)(ii); and PARA 502 post.

14 Ibid s 37(2)(b). A hospital order may be substituted on appeal for a sentence of imprisonment and it is not to be regarded as an increase of sentence, even though its result may be to subject the appellant to a longer period of detention: *R v Bennett* [1968] 2 All ER 753, [1968] 1 WLR 988, CA. As to applications to a mental health review tribunal by or in respect of persons subject to hospital orders see the Mental Health Act 1983 s 69 (as amended); and PARA 564 post.

15 See *R v Morris* [1961] 2 QB 237, [1961] 2 All ER 672, CCA; *R v Cox* [1968] 1 All ER 386, [1968] 1 WLR 308, CA; and cf *R v Gunnell* (1966) 50 Cr App Rep 242, CCA (where, as punishment was intended, a hospital order was refused). See also *Kiernan v Harrow Crown Court* [2003] EWCA Crim 1052 (where it was held that a judge who faced conflicting medical evidence erred in not giving reasons why he preferred the evidence in favour of mental illness, and thus the order was quashed as there was insufficient evidence to justify it; and it was said per curiam that doctors who had interviewed the victims had acted inappropriately as they were not investigators).

16 Ie the powers of the Secretary of State under the Mental Health Act 1983 s 47 (as amended) (see PARA 535 post). See *R v I* [2005] EWCA Crim 2077, [2005] All ER (D) 28 (Aug) (importance of the safety issue). As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

17 Mental Health Act 1983 s 37(7). A similar provision applies to an application for admission for treatment under Pt II (ss 2-34) (as amended): see s 11(6); and PARA 461 ante. As to orders by magistrates' courts see note 5 supra. See *Kiernan v Harrow Crown Court* [2003] EWCA Crim 1052; and note 15 supra.

18 le as set out in the text and notes 2-4 supra.

19 'Interim hospital order' has the meaning given in the Mental Health Act 1983 s 38 (as amended): ss 38(1), 145(1).

20 le on the same medical evidence as is required for a hospital order: see the text and notes 9-12 supra. However, at least one of the medical practitioners whose evidence is taken into account must be employed by the hospital to be specified in the order: *ibid* s 38(3).

21 *Ibid* s 38(1). The provisions of s 38(1), (5) (as amended) have effect as if any reference to the making of a hospital order included a reference to the giving of a hospital direction and a limitation direction (see PARA 490 ante): Mental Health Act 1983 s 45A(8) (added by the Crime (Sentences) Act 1997 s 46).

22 The power of renewing an interim hospital order may be exercised without the offender's being brought before the court if he is represented by counsel or a solicitor and his counsel or solicitor is given an opportunity of being heard: Mental Health Act 1983 s 38(6).

23 For the meaning of 'responsible medical officer' see PARA 489 note 19 ante.

24 Mental Health Act 1983 s 38(5).

25 The court may make a hospital order in the case of an offender who is subject to an interim hospital order without his being brought before the court if he is represented by counsel or a solicitor and his counsel or solicitor is given an opportunity of being heard: *ibid* s 38(2).

26 le after considering the written or oral evidence of the responsible medical officer: *ibid* s 38(5).

27 *Ibid* s 38(5) (amended by the Crime (Sentences) Act 1997 s 49(1)).

28 Mental Health Act 1983 ss 37(4), 38(4). For the meaning of 'managers' see PARA 439 ante.

29 *Ibid* ss 37(4), 38(4) (s 37(4) amended by the Crime (Sentences) Act 1997 ss 55, 56(2), Sch 4 para 12(3), Sch 6). The 28 day period is that within which a hospital order or an interim hospital order may be acted on (see the Mental Health Act 1983 s 40(1), (3); and PARA 494 post), unless the time is enlarged by reason of the offender's escaping (see s 138(5); and PARAS 447 ante, 494 post). As to the retaking of patients escaped from custody see PARA 447 ante. As to the power to reduce the prescribed period of 28 days see PARA 495 note 5 post.

Where s 37(4) (as amended) has not been complied with, justices have a power to rescind the order under the Magistrates' Court Act 1980 s 142 (as amended) (see MAGISTRATES): *R v Thames Magistrates' Court, ex p Ramadan* [1999] Crim LR 498, DC.

30 For the meaning of 'primary care trust' see PARA 414 note 6 ante.

31 For the meaning of 'health authority' see PARA 414 note 6 ante.

32 Mental Health Act 1983 s 39 (amended by the Health Authorities Act 1995 s 2(1), Sch 1 para 107(1), (5); and the National Health Service Reform and Health Care Professions Act 2002 s 2(5), Sch 2 Pt 2 paras 42, 46).

UPDATE

491 Hospital orders and interim hospital orders

NOTE 2--In head (3) reference to Criminal Justice Act 2003 ss 225-228 is now to s 225(2) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 73, 74, 82, 83) or 226(2) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 1600); also head (4) under the Violent Crime Reduction Act 2006 s 29(4) or (6) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 706A): Mental Health Act 1983 s 37(1A) (amended by Violent Crime Reduction Act 2006 Sch 1 para 2, Sch 5; and Criminal Justice and Immigration Act 2008 Sch 26 para 8 (not yet in force)).

NOTE 3--Words 'as being ... psychopathic disorder' omitted: Mental Health Act 1983 s 37(3) (amended by Mental Health Act 2007 Sch 1 para 7(b), Sch 11 Pt 1).

NOTES 5, 24-29--Mental Health Act 1983 ss 37(4), 38(4), (5) amended: Mental Health Act 2007 s 10(4), (5).

NOTE 5--SI 2005/384 r 49.2 replaced: Criminal Procedure Rules 2010, SI 2010/60, r 49.2.

TEXT AND NOTES 10-13--For 'mental illness ... severe mental impairment' read 'mental disorder' and for 'in the case of ... patient's condition' read 'appropriate medical treatment (see PARA 461) is available for him': Mental Health Act 1983 s 37(2) (amended by Mental Health Act 2007 s 4(5), Sch 1 para 7(a)).

NOTE 13--See *R (on the application of MM) v Secretary of State for the Home Department* [2007] EWCA Civ 687, (2007) 98 BMLR 130.

TEXT AND NOTE 17--Repealed: Mental Health Act 2007 Sch 11 Pt 1.

NOTE 25--References to counsel or solicitor now to an authorised person (see PARA 489): Mental Health Act 1983 s 38(2) (amended by Legal Services Act 2007 Sch 21 para 56).

TEXT AND NOTES 31, 32--References to health authority are now to local health board: Mental Health Act 1983 s 39 (amended by SI 2007/961).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(7) HOSPITAL AND GUARDIANSHIP ORDERS BY CRIMINAL COURTS/492. Requirements as to medical evidence.

492. Requirements as to medical evidence.

Of the two registered medical practitioners¹ whose written or oral evidence is taken into account² by the court in deciding whether to remand to hospital for treatment or make a hospital order or interim hospital order, at least one must be a practitioner approved³ by the Secretary of State⁴ as having special experience in the diagnosis or treatment of mental disorders⁵. The registered medical practitioner whose evidence is taken into account⁶ in deciding whether to remand to hospital for a report⁷ must be such a practitioner⁸. Where⁹ the court may act on the written evidence of a registered medical practitioner¹⁰ or a person representing the managers¹¹ of a hospital, a report in writing purporting to be signed by such a practitioner or person may be received in evidence without proof of signature, qualifications or authority, but the court may require the signatory to give oral evidence¹². Where, in pursuance of directions of the court, any such report is tendered in evidence otherwise than by or on behalf of the accused a copy must be given to his counsel or solicitor¹³, or, if he is not so represented, its substance must be disclosed to him or, where he is a child or young person, to his parent or guardian if present in court¹⁴; and, except where the evidence relates only to arrangements for admission to hospital, that person may require that the signatory be called to give oral evidence, and evidence to rebut the evidence contained in the report may be called by or on behalf of the accused¹⁵.

1 For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.

2 Ie under the Mental Health Act 1983 s 36(1), s 37(2)(a), s 38(1), s 45A(2) (as added) and s 51(6)(a): see PARAS 489-491 ante. The Code of Practice (1999) PARAS 3.1-3.21 gives guidance on the assessment of patients concerned with criminal proceedings; and for guidance on assessment by a doctor see Code of Practice (1999) PARAS 3.7-3.10. As to the Code of Practice see PARA 436 ante.

3 Ie approved for the purposes of the Mental Health Act 1983 s 12 (as amended): see PARA 482 ante.

4 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

5 Mental Health Act 1983 s 54(1) (amended by the Crime (Sentences) Act 1997 s 55, Sch 4 para 12(6)).

6 Ie under the Mental Health Act 1983 s 35(3)(a): see PARA 489 ante. As to the guidance given in the Code of Practice (1999) see note 2 supra.

7 As to such reports see the Mental Health Act 1983 s 47(1) (as amended), s 48(1); and PARAS 535-536 post.

8 Ibid s 54(1).

9 Ie for the purpose of any provision of ibid Pt III (ss 35-55) (as amended).

10 The Act also refers to a registered medical practitioner of any description: see ibid s 54(2).

11 For the meaning of 'managers' see PARA 439 ante.

12 Mental Health Act 1983 s 54(2).

13 Ibid s 54(3)(a). There is no power of cross-examination where the report relates only to arrangements for admission to hospital.

14 Ibid s 54(3)(b).

15 Ibid s 54(3)(c).

UPDATE

492 Requirements as to medical evidence

TEXT AND NOTES 9-12--Mental Health Act 1983 s 54(2) now s 54(2), (2A) (substituted by Mental Health Act 2007 s 11(6)).

TEXT AND NOTE 13--Reference to counsel or solicitor now to an authorised person (see PARA 489): Mental Health Act 1983 s 54(3)(a) (amended by Legal Services Act 2007 Sch 21 para 58).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(7) HOSPITAL AND GUARDIANSHIP ORDERS BY CRIMINAL COURTS/493. Restriction on making of other orders.

493. Restriction on making of other orders.

Where the court makes a hospital order¹, it must not pass a sentence of imprisonment² or impose a fine or make a community order³ in respect of the offence⁴, nor⁵ may it make a referral order⁶ in respect of the offence⁷, nor make in respect of the offender a supervision order⁸ or an order relating to the binding over of a parent or guardian⁹, although it may make any other order¹⁰ which it has power to make¹¹.

1 Or a guardianship order: see PARA 502 post. The reference in the text is a reference to orders under the Mental Health Act 1983 s 37 (as amended): see PARA 491 ante. For the meaning of 'hospital order' see PARA 491 note 5 ante.

2 For this purpose, a sentence of imprisonment includes any sentence or order for detention: *ibid* s 37(8).

3 I.e. a community order within the Criminal Justice Act 2003 Pt 12 (ss 142-305) (as amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163.

4 Mental Health Act 1983 s 37(8)(a) (amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 37, 38(c)).

5 I.e. if the order is a hospital order.

6 I.e. within the meaning of the Powers of Criminal Courts (Sentencing) Act 2000: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 344 et seq.

7 Mental Health Act 1983 s 37(8)(b) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 90(1), (6)(a)).

8 I.e. within the meaning of the Powers of Criminal Courts (Sentencing) Act 2000: see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1340 et seq; CRIMINAL LAW, EVIDENCE AND PROCEDURE.

9 Mental Health Act 1983 s 37(8)(c) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 paras 90(1), (6)(b)). As to orders relating to the binding over of a parent or guardian see the Powers of Criminal Courts (Sentencing) Act 2000 s 150; and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1288; SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 312.

10 I.e. any other order which it has power to make apart from the Mental Health Act 1983 s 37 (as amended), such as confiscation or forfeiture orders.

11 *Ibid* s 37(8) (amended by the Youth Justice and Criminal Evidence Act 1999 s 67, Sch 4 para 11).

UPDATE

493 Restriction on making of other orders

TEXT AND NOTES--Mental Health Act 1983 s 37(8) further amended: Criminal Justice and Immigration Act 2008 Sch 4 para 30, Sch 28 Pt 1.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(7) HOSPITAL AND GUARDIANSHIP ORDERS BY CRIMINAL COURTS/494. Effect of hospital order and interim hospital order.

494. Effect of hospital order and interim hospital order.

A hospital order¹ is sufficient authority for a constable², approved social worker³ or other person directed to do so by the court to convey the patient⁴ to the hospital⁵ specified in the order within a period of 28 days⁶, and for the managers⁷ of the hospital to admit him at any time within that period and detain him afterwards⁸.

Where an interim hospital order⁹ is made, a constable or other person directed to do so by the court must convey the offender to the specified hospital within 28 days¹⁰ and the managers must admit him within that period and detain him afterwards in accordance with the relevant statutory provision¹¹. If an offender absconds from a hospital in which he is detained in pursuance of an interim hospital order, or while being conveyed to or from such a hospital, he may be arrested without warrant by a constable; after being arrested, he must as soon as practicable be brought before the court that made the order and the court may thereupon terminate the order and deal with him in any way in which it could have dealt with him¹².

Once the patient is admitted to a hospital in pursuance of a hospital order, any previous application, hospital order (without a restriction order¹³) or guardianship order ceases to have effect¹⁴. A patient so admitted must be treated for the purposes of the general statutory provisions relating to compulsory admission to hospital¹⁵ as if he had been so admitted on the date of the order in pursuance of an application for admission for treatment¹⁶, with certain modifications and exceptions¹⁷. The most important distinctions are that the power to order his discharge will not be exercisable by his nearest relative¹⁸ and the patient does not have the right to apply to a mental health review tribunal within the first six months after the order¹⁹.

The statutory provisions relating to consent to treatment apply to patients liable to be detained under either hospital orders or interim hospital orders²⁰.

1 For the meaning of 'hospital order' see PARA 491 note 5 ante.

2 As to the office of constable see POLICE vol 36(1) (2007 Reissue) PARA 101 et seq.

3 For the meaning of 'approved social worker' see PARA 427 ante.

4 For the meaning of 'patient' see PARA 435 ante.

5 For the meaning of 'hospital' see PARA 417 ante.

6 Mental Health Act 1983 s 40(1)(a). In computing this period no account is to be taken of any time during which the patient is at large: s 138(5). As to the power to reduce the period prescribed by this provision see PARA 495 post.

7 For the meaning of 'managers' see PARA 439 ante.

8 Mental Health Act 1983 s 40(1)(b).

9 For the meaning of 'interim hospital order' see PARA 491 note 19 ante.

10 I.e. the period specified in the Mental Health Act 1983 s 38(4): see PARA 491 ante. As to the power to reduce the period prescribed by this provision see PARA 495 post.

11 Ibid s 40(3). Such detention must be in accordance with s 38 (as amended) (see PARA 491 ante). As to the duration of interim hospital orders see PARA 491 ante.

12 Ibid s 38(7).

13 A hospital order does not cease to have effect under this provision if a restriction order is in force at the material time: *ibid* s 41(4).

14 Ibid s 40(5). However, if the order or the conviction on which it was made (or the special verdict of not guilty by reason of insanity, or findings that the accused did the act or made the omission charged against him but was under a disability) is quashed on appeal, this does not apply. Instead s 22 (as amended) (see PARA 522 post) applies as if the patient had been detained in custody during the period for which he was liable to be detained under the quashed order: s 40(5).

In addition, where a patient admitted to a hospital in pursuance of a hospital order is absent without leave and a warrant to arrest him has been issued under the Criminal Justice Act 1967 s 72 (as amended) (see PARA 510 post) and he is held pursuant to the warrant in any country or territory other than the United Kingdom, any of the Channel Islands and the Isle of Man, he is to be treated as having been taken into custody under the Mental Health Act 1983 s 18 (as amended) on first being so held: s 40(6) (added by the Mental Health (Patients in the Community) Act 1995 s 2(4)).

As to appeals generally see PARAS 504-505 post. As to the return and readmission of patients absent without leave etc see the Mental Health Act 1983 s 18 (as amended), s 21 (as substituted), ss 21A, 21B (both as added), s 22 (as amended); and PARAS 507, 521-522 post. For the meaning of 'United Kingdom' see PARA 406 note 18 ante.

15 *Ie* those applied by *ibid* Sch 1 Pt I (as amended): see PARA 487 note 9 ante. With certain modifications, these cover most of the provisions relating to the effects of an admission for treatment except ss 6, 15. Section 6 relates to the authority given by an application for admission for treatment (see PARAS 464-466 ante) and s 15 to rectification of applications and recommendations (see PARAS 467-468 ante); both are therefore inapplicable to hospital orders. See further PARA 487 ante.

16 *Ie* under *ibid* s 3: see PARA 461 ante.

17 See *ibid* Sch 1 Pt I (as amended); and PARA 487 note 9 ante. This provision does not apply to interim hospital orders.

18 Ibid Sch 1 Pt I paras 2, 8. As to the power to order discharge see PARA 523 post. For the meaning of 'nearest relative' see PARA 453 ante. The nearest relative may, however, apply to a mental health review tribunal within certain periods: see s 69(1)(a); and PARA 564 post.

19 Ibid Sch 1 Pt I paras 2, 9 (amended by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 14).

20 See the Mental Health Act 1983 s 56(1); and PARAS 551-558 post.

UPDATE

494 Effect of hospital order and interim hospital order

TEXT AND NOTE 3--Reference to social worker now to mental health professional: Mental Health Act 1983 s 40(1)(b) (amended by Mental Health Act 2007 Sch 2 para 7(e)).

NOTE 6--See *R (on the application of DB) v Nottinghamshire Healthcare NHS Trust*; *R (on the application of X) v An NHS Trust* [2008] EWCA Civ 1354, [2009] 2 All ER 792 (transfer of patient outside 28-day period was unlawful).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(7) HOSPITAL AND GUARDIANSHIP ORDERS BY CRIMINAL COURTS/495. Detention of patient in place of safety pending admission to hospital.

495. Detention of patient in place of safety pending admission to hospital.

The court by which a hospital order¹ or an interim hospital order² is made may give such directions as it thinks fit for the conveyance of the patient³ to a place of safety⁴ and his detention there pending admission to hospital within the prescribed period⁵ of 28 days⁶.

If, within the period of 28 days beginning with the day on which a hospital order⁷ is made, it appears to the Secretary of State that by reason of an emergency or other special circumstances it is not practicable for the patient to be received into the hospital specified in the order, he may give directions for the admission of the patient to such other hospital as appears to be appropriate⁸.

1 For the meaning of 'hospital order' see PARA 491 note 5 ante.

2 For the meaning of 'interim hospital order' see PARA 491 note 19 ante.

3 For the meaning of 'patient' see PARA 435 ante.

4 'Place of safety', in relation to a person not being a child or young person, means any police station, prison or remand centre, or any hospital the managers of which are willing temporarily to receive him; and in relation to a child or young person it means a place of safety within the meaning of the Children and Young Persons Act 1933 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 608); Mental Health Act 1983 s 55(1). 'Child' and 'young person' have the same meanings as in the Children and Young Persons Act 1933 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 3); Mental Health Act 1983 s 55(1). For the meaning of 'hospital' see PARA 417 ante. For the meaning of 'managers' see PARA 439 ante.

5 The period prescribed by *ibid* s 37(4) (as amended) (see the text and note 6 *infra*), s 38(4) (see PARA 491 ante). The Secretary of State has the power to make an order reducing the length of the periods prescribed by ss 37(4), (5) (as amended) and s 38(4), and to make consequential amendments to s 40(1) (see PARA 494 ante) and s 44(3) (see PARA 498 post); see s 54A (added by the Criminal Justice Act 1991 s 27(2)). As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

6 See the Mental Health Act 1983 s 37(4) (as amended), s 38(4); and PARA 491 ante.

7 Similar provision for interim hospital orders is not made by *ibid* s 38 (as amended) (see PARA 491 ante).

8 *Ibid* s 37(5). Where such directions are given, the Secretary of State must cause the person having the custody of the patient to be informed, and the hospital order will have effect as if the hospital specified in the direction of the Secretary of State were substituted for the hospital specified in the order: s 37(5). As to the power to reduce the period prescribed under this provision see note 5 *supra*.

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496. The Crown Court's power to make a restriction order.

Where a hospital order¹ is made in respect of an offender by the Crown Court² and it appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm to do so, the court may, subject to the requirement of oral evidence³, further order that the offender is to be subject to special restrictions⁴, either without limit of time or during such period⁵ as may be specified in the order⁶. This is known as a restriction order⁷.

A restriction order may not be made unless at least one of the two medical practitioners whose evidence must be taken into account by the court when making the hospital order⁸ has given evidence orally before the court⁹.

So long as a restriction order is in force, the following special restrictions apply:

- 20 (1) the general statutory provisions relating to the duration, renewal and expiration of the authority for detention¹⁰ do not apply and the patient¹¹ continues to be liable to be detained until duly discharged¹² or absolutely discharged¹³ by the Secretary of State¹⁴;
- 21 (2) the statutory provisions relating to after-care under supervision do not apply¹⁵;
- 22 (3) the ordinary provisions¹⁶ relating to application to a mental health review tribunal either by the patient or by his nearest relative do not apply¹⁷;
- 23 (4) the consent of the Secretary of State must be obtained to: (a) any grant of leave of absence to the patient¹⁸; (b) any transfer of the patient to another hospital or to guardianship¹⁹; and (c) any order for the discharge²⁰ of the patient²¹;
- 24 (5) if leave of absence is granted, the Secretary of State as well as the responsible medical officer²² has power to recall the patient²³ to hospital and may do so at any time²⁴; and
- 25 (6) if the patient is absent without leave, the Secretary of State has power to take the patient into custody and return him to hospital²⁵ at any time, irrespective of the length of his absence²⁶.

In relation to any such patient the general provisions as to compulsory admission and guardianship have effect subject to certain exceptions and modifications²⁷.

Patients subject to restriction orders have a specific right of application to a tribunal²⁸.

1 As to hospital orders see PARA 491 et seq ante.

2 As to the Crown Court see COURTS vol 10 (Reissue) PARA 621 et seq.

3 ie subject to the Mental Health Act 1983 s 41(2): see the text and notes 8-9 infra.

4 ie those set out in ibid s 41(3) (as amended): see the text and notes 10-27 infra.

5 Orders should be made without limit of time unless the patient's recovery can be confidently predicted within a limited period: *R v Gardiner* [1967] 1 All ER 895, [1967] 1 WLR 464, CA; *R v Haynes* (1981) 3 Cr App Rep (S) 330, [1982] Crim LR 245, CA; *R v Birch* (1989) 90 Cr App Rep 78, CA; *R v Nwolia* [1996] 1 Cr App Rep (S) 170, (1995) 26 BMLR 157, CA (where a restriction order was imposed on a man who committed an

unprovoked, violent offence against an unsuspecting member of the public). As to a restriction order without limitation of time see *R (on the application of the Secretary of State for the Home Department) v Mental Health Review Tribunal* [2004] EWHC 2194 (Admin), [2004] All ER (D) 87 (Oct). See also *R v Drew* [2003] UKHL 25, [2003] 4 All ER 557; *R v A* [2005] EWCA Crim 2077, [2005] All ER (D) 28 (Aug).

6 Mental Health Act 1983 s 41(1). It is the seriousness of the harm which the public might suffer rather than the seriousness of the risk of re-offending that is in question: *R v Birch* (1989) 90 Cr App Rep 78, CA (where the Court of Appeal considered the general principles to be observed in deciding whether a restriction order is appropriate, when quashing a restriction order imposed upon a woman who had shot and killed her husband). A restriction order should be considered in cases where the protection of the public is involved, particularly in cases of violence or the more serious sexual offences: *R v Gardiner* [1967] 1 All ER 895, [1967] 1 WLR 464, CA. See also *R (on the application of Jones) v Isleworth Crown Court* [2005] EWHC 662 (Admin), [2005] All ER (D) 33 (Mar) (in assessing the risk of serious harm the judge is not bound to determine future risk solely by reference to the nature of violence in the past). There must be a risk of serious harm to the public at large: *R v Courtney* (1987) 9 Cr App Rep (S) 404, [1988] Crim LR 130, CA (where the Court of Appeal quashed a restriction order imposed upon a man of good character who had killed his wife while undergoing treatment for depression). See also *R v Macrow* [2004] EWCA Crim 1159, [2004] All ER (D) 277 (Apr). There must be a proportionate relationship between the offence and the history of offending, together with an assessment of risk based on medical opinion, before an order is made: *R v Martin* (6 November 1998, unreported), CA. Possible early release by the tribunal is not a ground for passing a life sentence as an alternative (although release procedures under a life sentence and a hospital order with restrictions are similar in practice): *R v Mitchell* [1997] 1 Cr App Rep (S) 90, [1996] Crim LR 604. As to what constitutes 'serious harm' see *R v Melbourne* [2000] 1 MHLR 2, CA; *R v Kamara* [2000] 1 MHLR 9, CA; *R v Czarnota* [2002] EWCA Crim 785, [2002] 1 MHLR 144. In a case where the 20-year old defendant had pleaded guilty to one count of rape, eight counts of indecent assault and three counts of possession of an offensive weapon and was sentenced to life imprisonment, the appropriate sentence was a hospital order with indefinite restriction under the Mental Health Act 1983 s 41 (as amended); while judges give appropriate weight to the differences between the regimes of custody for life and a hospital order with an indefinite restriction, the latter regime would not in this case afford significantly less protection to the public than the former: see *R v A* [2005] EWCA Crim 2077, [2005] All ER (D) 28 (Aug). Before making a restriction order the court should inquire whether the hospital has facilities for keeping patients in safe custody: see *R v Higginbotham* [1961] 3 All ER 616, [1961] 1 WLR 1277, CCA; *R v Cox* [1968] 1 All ER 386, [1968] 1 WLR 308, CA. See also *R v Nwobia* [1996] 1 Cr App Rep (S) 170, (1995) 26 BMLR 157, CA (where a restriction order was imposed on a man who committed an unprovoked, violent offence against an unsuspecting member of the public). The power to direct that such an order is to cease to have effect is vested in the Secretary of State: see the Mental Health Act 1983 s 42(1); and PARA 501 post. As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

See also *A v Harrow Crown Court* [2003] EWHC 2020 (Admin), [2003] All ER (D) 78 (Aug); *R (on the application of G) v Mental Health Review Tribunal* [2004] EWHC 2193 (Admin), [2004] All ER (D) 86 (Oct); *R (on the application of the Secretary of State for the Home Department) v Mental Health Review Tribunal* [2004] EWHC 2194 (Admin), [2004] All ER (D) 87 (Oct).

7 Mental Health Act 1983 s 41(1). 'Restriction order' has the meaning given by s 41 (as amended): s 145(1).

A conditionally discharged patient may be lawfully detained under the Mental Health Act 1983 s 3, notwithstanding that he remains liable to detention under s 41 (as amended): *R v North West London Mental Health NHS Trust, ex p Stewart* [1998] QB 628, [1997] 4 All ER 871, CA. A restriction order remains in force even if the patient who is conditionally discharged is subsequently imprisoned for an offence; the patient may be recalled to hospital at the end of the prison sentence: *R v Merseyside Mental Health Review Tribunal, ex p K* [1990] 1 All ER 694; *R v Secretary of State for the Home Department, ex p K* [1990] 3 All ER 562.

8 Ie the medical practitioners upon whose written or oral evidence the court must act when making a hospital order: see the Mental Health Act 1983 s 37(2)(a); and PARA 491 ante.

9 Ibid s 41(2). It is not necessary for this to be the medical practitioner who would be in charge of the patient's treatment in hospital, nor is it necessary for either medical practitioner to recommend the making of a restriction order: *R v Blackwood* (1974) 59 Cr App Rep 170, CA; *R v Royse* (1981) 3 Cr App Rep (S) 58, CA. The court cannot make an order, based on its own previous experience in the courts, unsupported by medical evidence: *R v Reynolds* [2000] All ER (D) 1313, CA; and see *R v Ristic* [2002] EWCA Crim 165, [2002] All ER (D) 341 (Jan) (although the doctors were not suggesting a restriction order, a judge could impose one after consideration of the evidence and the legislative requirements). As to the evidence of the medical practitioners see *R v Birch* (1989) 90 Cr App Rep 78, CA; *R v Crookes* [1999] 1 MHLR 45, CA; *R v Chalk* [2002] EWCA Crim 2434, [2002] All ER (D) 509 (Oct); *R (on the application of Jones) v Isleworth Crown Court* [2005] EWHC 662 (Admin), [2005] All ER (D) 33 (Mar). See also *R v Ancharya* [2005] EWCA Crim 772, [2005] All ER (D) 225 (Mar) (judges should balance the risks, eg the risk of relapse from failure to comply with treatment, against the disadvantages of imposing the order).

10 Ie the provisions contained in the Mental Health Act 1983 Pt II (ss 2-34) (as amended). See, in particular, ss 20-22 (as amended); and PARAS 518-522 post.

11 For the meaning of 'patient' see PARA 435 ante.

12 Ie under the Mental Health Act 1983 Pt II (as amended): see s 23 (as amended); and PARA 523 post. His nearest relative has no power to discharge him since he is detained under a hospital order (see PARA 494 ante) and the consent of the Secretary of State is necessary for others to do so: see the text and notes 20-21 infra.

13 Ie under ibid s 42(2): see PARA 524 post.

14 Ibid s 41(3)(a).

15 Ibid s 41(3)(aa) (added by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 5). The provisions referred to in the text are those of the Mental Health Act 1983 Pt II (as amended): see PARA 528 et seq post.

16 Ie ibid s 66 (as amended), s 69(1): see PARA 564 post.

17 Ibid s 41(3)(b). However, the patient has the right to apply to a tribunal under s 70 (as amended): see the text and note 28 infra; and PARA 564 post.

18 Mental Health Act 1983 s 41(3)(c)(i). This power is under s 17 (as amended): see PARA 506 post. The Secretary of State can attach conditions to the grant of leave of absence: *R (on the application of A) v Secretary of State for the Home Department* [2002] EWHC 1618 (Admin), [2003] 1 WLR 330. The Mental Health Act 1983 s 17 (as amended) and s 41(3)(c) (as amended) should operate to ensure that there is no unreasonable delay in the implementation of a mental health review tribunal decision: see *Johnson v United Kingdom* (1997) 27 EHRR 296, 40 BMLR 1, ECHR. There is no obligation to grant a patient unescorted leave as an alternative to a conditional discharge by a mental health review tribunal where conditions are fulfilled: *R (on the application of Hurlock) v Page and Secretary of State for the Home Department* [2001] EWHC 380 (Admin).

19 Mental Health Act 1983 s 41(3)(c)(ii) (amended by the Crime (Sentences) Act 1997 s 49(2)). This power is in pursuance of regulations made under the Mental Health Act 1983 s 19 (as amended) or in pursuance of s 19(3) (as amended): see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, regs 7-9 (as amended); and PARA 511 et seq post. See *R (on the application of the Secretary of State for the Home Department) v Mental Health Review Tribunal* [2004] EWHC 2194 (Admin), [2004] All ER (D) 87 (Oct).

20 Ie under the Mental Health Act 1983 s 23 (as amended): see PARA 523 et seq post.

21 Ibid s 41(3)(c)(iii).

22 For the meaning of 'responsible medical officer' see PARA 489 note 19 ante.

23 The responsible medical officer may not recall a patient after he has ceased to be liable to be detained under the Mental Health Act 1983 Pt II (as amended): see the Mental Health Act 1983 s 17(5) (as amended); and PARA 506 post.

24 Ibid s 41(3)(c), (d).

25 Ie under ibid s 18 (as amended): see PARA 507 post. These powers of arrest are specifically preserved by the Police and Criminal Evidence Act 1984 s 26(2), Sch 2: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 927.

26 Mental Health Act 1983 s 41(3)(d).

27 See ibid s 40(4), s 41(3) (as amended), Sch 1 Pt II (as amended); and PARA 487 note 12 ante.

28 Ibid ss 70, 79(1) (as amended). See PARA 564 post.

UPDATE

496 The Crown Court's power to make a restriction order

TEXT AND NOTES 5, 6--Words 'either without ... order' omitted: Mental Health Act 1983 s 41(1) (amended by Mental Health Act 2007 s 40(1), Sch 11 Pt 8).

TEXT AND NOTE 15--Now, head (2) the statutory provisions relating to community treatment orders and community patients: Mental Health Act 1983 s 41(3)(aa) (amended by Mental Health Act 2007 Sch 3 para 17).

NOTES 18-24--Mental Health Act 1983 s 41(3)(c) amended: Mental Health Act 2007 s 10(6).

NOTE 19--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

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497. Effect of cessation of order restricting discharge.

Where a restriction order¹ ceases to have effect² while the relevant hospital order³ remains in force, the patient⁴ must be treated as if he had been admitted to the hospital⁵ concerned in pursuance of a hospital order, without an order restricting his discharge, made on the date when the restriction order ceased to have effect⁶.

1 See the Mental Health Act 1983 s 41(1); and PARA 496 ante.

2 Ie either because the order was for a limited duration (see *ibid* s 41(1); and PARA 496 ante) which has expired or because the Secretary of State has so directed (see s 42(1); and PARA 501 post). As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

3 For the meaning of 'hospital order' see PARA 491 note 5 ante.

4 For the meaning of 'patient' see PARA 435 ante.

5 For the meaning of 'hospital' see PARA 417 ante.

6 Mental Health Act 1983 ss 41(5), 40(4), Sch 1 Pt I (amended by the Mental Health (Patients in the Community) Act 1995 ss 1(2), 2(8), Sch 1 paras 6, 14). He is treated as if suffering from the form of mental disorder specified in the original hospital order or in the Secretary of State's direction: see the Mental Health Act 1983 s 55(3). As to the right of such a patient to apply to a mental health review tribunal see s 69(2)(a) (as amended); and PARA 564 post. If a patient has been conditionally discharged before restrictions end, he will cease to be liable to be detained: see s 42(5); and PARA 524 post.

UPDATE

497 Effect of cessation of order restricting discharge

NOTE 6--Mental Health Act 1983 s 55(3) repealed: Mental Health Act 2007 Sch 11 Pt 1.

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498. Committal by magistrates' court to Crown Court for restriction order.

When a magistrates' court¹ is dealing with an offender of 14 years or over, where the conditions² for making a hospital order³ are satisfied but it appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that if a hospital order is made then a restriction order should also be made, the court may, instead of making a hospital order or dealing with the offender in any other manner, commit him in custody⁴ to the Crown Court to be dealt with in respect of his offence⁵. The Crown Court may then⁶ either make a hospital order⁷, with or without a restriction order, or deal with the offender in any other manner in which the magistrates' court might have done⁸.

1 As to magistrates' courts see MAGISTRATES vol 29(2) (Reissue) PARA 583 et seq.

2 See the Mental Health Act 1983 s 37(1) (as amended); and PARA 491 ante.

3 For the meaning of 'hospital order' see PARA 491 note 5 ante.

4 Instead of committing the offender in custody, the court, if satisfied on written or oral evidence (given by the registered medical practitioner who would be in charge of the offender's treatment or some other person representing the managers of the hospital in question) that arrangements have been made for the admission of the offender to a hospital, may direct that he be admitted to that hospital and detained there until the case is disposed of by the Crown Court, giving such directions as it thinks fit for his production by the hospital to the Crown Court: Mental Health Act 1983 s 44(1), (2). The provisions of s 37(4), (5) (as amended) and s 40(1) (see PARA 495 ante) apply as if to a hospital order but omitting reference to the period of 28 days; until the case is disposed of by the Crown Court the order has the effect of a hospital order with a restriction order without limit of time: s 44(3). The power of the Crown Court in certain circumstances to make a hospital order where it is impracticable or inappropriate to bring the person before the court (ie under s 51(5), (6): see PARA 539 post) applies to persons admitted to hospital under this provision: s 51(7). For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante. For the meaning of 'managers' see PARA 439 ante. As to the Crown Court see COURTS vol 10 (Reissue) PARA 621 et seq.

5 See *ibid* s 43(1). The power of a magistrates' court under the Powers of Criminal Courts (Sentencing) Act 2000 s 3 (prospectively substituted) (which enables such a court to commit an offender to the Crown Court where the court is of the opinion that greater punishment should be inflicted for the offence than the court has power to inflict: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARAS 1123-1124) may also be exercised where the magistrates' court is of the opinion that such greater punishment should be inflicted unless a hospital order with a restriction order is made in his case: Mental Health Act 1983 s 43(4) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 91). As to these powers see MAGISTRATES vol 29(2) (Reissue) PARA 779.

As from a day to be appointed, the Mental Health Act 1983 s 43(4) (as amended) is substituted so as to refer also to the Powers of Criminal Courts (Sentencing) Act 2000 s 3B (prospectively added): Mental Health Act 1983 s 43(4) (prospectively substituted by the Criminal Justice Act 2003 s 41, Sch 3 Pt 2 para 55(1), (2)). At the date at which this volume states the law no such day had been appointed.

The power of the Crown Court to make a hospital order with or without a restriction order in the case of a person convicted before that court of an offence may, in the same circumstances and subject to the same conditions, be exercised by such a court in the case of a person committed to the court under the Vagrancy Act 1824 s 5 (as amended; prospectively repealed) (which provides for the committal to the Crown Court of persons who are incorrigible rogues within the meaning of that provision: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 835): Mental Health Act 1983 s 43(5). This provision is prospectively repealed by the Criminal Justice Act 2003 s 332, Sch 37 Pt 9 as from a day to be appointed under s 336(3). At the date at which this volume states the law no such day had been appointed.

6 Ie after inquiring into the circumstances of the case: see the Mental Health Act 1983 s 43(2).

7 le if it would have power to do so on conviction before it of such an offence as is mentioned in *ibid* s 37(1) (as amended): see *PARA 491 ante*.

8 *Ibid* s 43(2). The Crown Court has the same power under ss 35, 36, 38 (as amended) to remand such a person to hospital for report or medical treatment as it has in the case of an accused person (see *PARA 488 ante*) and to make an interim hospital order as it has in the case of a person convicted before it (see *PARA 491 ante*): s 43(3). As to the meaning of 'medical treatment' see *PARA 552 post*.

UPDATE

498 Committal by magistrates' court to Crown Court for restriction order

NOTE 4--Mental Health Act 1983 s 44(2) amended: Mental Health Act 2007 s 10(7). Words 'without limit of time' omitted: Mental Health Act 1983 s 44(3) (amended by Mental Health Act 2007 s 40(3)(a), Sch 11 Pt 8). For effect see s 40(7).

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499. Duty of court to make orders after special verdict or findings of disability.

Where a special verdict is returned that the accused is not guilty by reason of insanity¹ or findings have been made that an accused is under a disability and that he did the act or made the omission charged against him², the court must make in respect of the accused: (1) a hospital order³ (with or without a restriction order)⁴; (2) a supervision order⁵; or (3) an order for his absolute discharge⁶. Where the offence to which the special verdict or the findings relate is an offence the sentence for which is fixed by law and the court has power to make a hospital order, the court must make a hospital order with a restriction order (whether or not it would⁷ have power to make a restriction order)⁸. There are similar powers⁹ on an appeal¹⁰ where the Court of Appeal is of the opinion that there should have been such a verdict or findings¹¹.

There are corresponding provisions in regard to persons on trial before a court-martial under the Courts-Martial (Appeals) Act 1968¹², the Army Act 1955¹³, the Air Force Act 1955¹⁴ or the Naval Discipline Act 1957¹⁵.

1 See the Trial of Lunatics Act 1883 s 2(1) (amended by the Criminal Procedure (Insanity) Act 1964 s 1). Except for persons arraigned before 1 January 1992, such a verdict cannot be returned except on written or oral evidence (to which the provisions of the Mental Health Act 1983 s 54(2), (3) (see PARA 492 ante) apply) of two or more registered medical practitioners (at least one of whom is approved for the purpose of the Mental Health Act 1983 s 12 (as amended) (see PARA 482 ante)); see the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 ss 1(1), (2), 6(1), 8(1); and the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (Commencement) Order 1991, SI 1991/2488. As to insanity and the special verdict generally see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARAS 1339, 1345.

2 Criminal Procedure (Insanity) Act 1964 s 5(1) (s 5 substituted by the Domestic Violence, Crime and Victims Act 2004 s 24(1)). As to findings of unfitness to plead and that the accused did the act or made the omission charged against him see also the Criminal Procedure (Insanity) Act 1964 s 4 (as substituted and amended), s 4A (as added and amended); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1265.

3 'Hospital order' has the meaning given in the Mental Health Act 1983 s 37 (as amended) (see PARA 491 note 5 ante): Criminal Procedure (Insanity) Act 1964 s 5(4) (as substituted: see note 2 supra). Previously compliance with the Mental Health Act 1983 s 37 (as amended) (see PARA 491 ante) as to medical evidence was technically not required although in practice it was followed, but now such compliance is legally required. See note 4 infra.

4 Criminal Procedure (Insanity) Act 1964 s 5(2)(a) (as substituted: see note 2 supra). 'Restriction order' has the meaning given in the Mental Health Act 1983 s 41 (as amended) (see PARA 496 note 7 ante): Criminal Procedure (Insanity) Act 1964 s 5(4) (as so substituted).

As to the application of the Mental Health Act 1983 ss 35-38 (as amended) (see PARA 491 ante) see the Criminal Procedure (Insanity) Act 1964 s 5A(1)-(4) (as added); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 332 et seq. Under s 5A (as added), where the court has not yet made one of the disposals referred to in s 5(2) (as substituted) (see heads (1)-(3) in text), there are powers for the court to make orders under the Mental Health Act 1983 s 35 (remand to hospital for report on the accused's medical condition: see PARA 489 ante), s 36 (remand of the accused to hospital for treatment: see PARA 489 ante) and s 38 (as amended) (interim hospital order: see PARA 491 ante).

5 Criminal Procedure (Insanity) Act 1964 s 5(2)(b) (as substituted: see note 2 supra). 'Supervision order' has the meaning given in Sch 1A Pt 1 (as added) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 368): s 5(4) (as so substituted). See also s 5A(5), Sch 1A (as added). See note 4 supra.

6 Ibid s 5(2)(c) (as substituted: see note 2 supra). See also s 5A(6) (as added); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 40. See note 4 supra.

7 Ie apart from ibid s 5 (as substituted).

8 Ibid s 5(3) (as substituted: see note 2 supra). Where there are no findings as to a person being under a disability rather than not guilty by reason of insanity the court has no power to make a hospital order whatever the offence where the psychiatric conditions for an order under the Mental Health Act 1983 s 37 (as amended) are not met, eg where the disability was a physical disorder without any mental illness or impairment. In such a case, the only possible disposal would be a supervision order or an order for absolute discharge.

9 Depending on the circumstances, there may be power to make a hospital order (with or without a restriction order), a supervision order, an order for absolute discharge, an order for remand to hospital for report or treatment or an interim hospital order.

10 Ie an appeal against conviction under the Criminal Appeal Act 1968 s 1(1) (as amended) or against a finding of not guilty by reason of insanity under s 12 (as amended).

11 See ibid ss 6, 14 (both substituted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 4; and amended by the Domestic Violence, Crime and Victims Act 2004 s 24(3)). The powers under the Criminal Appeal Act 1968 s 6 (as substituted and amended) are available on any appeal against conviction. The powers under s 14 (as substituted and amended) are available on an appeal under s 12 (as amended): see further PARA 500 post. As to the Court of Appeal see COURTS vol 10 (Reissue) PARA 634 et seq.

12 Ie under the Courts-Martial (Appeals) Act 1968 s 16 (as substituted): see ARMED FORCES.

13 Ie under the Army Act 1955 ss 115A, 115B (both as added), s 116 (as substituted), ss 116A-116D (all as added): see ARMED FORCES vol 2(2) (Reissue) PARAS 500, 506.

14 Ie under the Air Force Act 1955 ss 115A, 115B (both as added), s 116 (as substituted), ss 116A-116D (all as added): see ARMED FORCES vol 2(2) (Reissue) PARAS 500, 506.

15 Ie under the Naval Discipline Act 1957 ss 62A, 62B (both as added), s 63 (as substituted), ss 63A-63D (all as added): see ARMED FORCES vol 2(2) (Reissue) PARAS 460, 469.

UPDATE

499 Duty of court to make orders after special verdict or findings of disability

TEXT AND NOTES 13-16--Army Act 1955, Air Force Act 1955 and Naval Discipline Act 1957 replaced: Armed Forces Act 2006.

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500. Orders following acquittal on criminal appeal.

Where on an appeal against a verdict of 'not guilty by reason of insanity'¹ the Court of Appeal², on the written or oral evidence of two or more registered medical practitioners³, is of the opinion that the case is not one where there should have been a verdict of acquittal, but there should have been findings that the accused was under a disability and that he did the act or made the omission charged against him⁴, the Court of Appeal must make in respect of the accused: (1) a hospital order⁵ (with or without a restriction order)⁶; (2) a supervision order⁷; or (3) an order for his absolute discharge⁸.

Where the offence to which the appeal relates is an offence the sentence for which is fixed by law and the court has power to make a hospital order, the court must make a hospital order with a restriction order (whether or not it would otherwise⁹ have power to make a restriction order)¹⁰. Where the Court of Appeal makes an interim hospital order¹¹: (a) the power of renewing or terminating it and of dealing with the appellant on its termination is exercisable by the court below and not by the Court of Appeal¹²; and (b) the court below is treated for the purposes of the relevant provision on absconding offenders¹³ as the court that made the order¹⁴. Where the Court of Appeal makes a supervision order¹⁵, any power of revoking or amending it is exercisable as if the order had been made by the court below¹⁶.

1 As to such appeals see the Criminal Appeal Act 1968 s 12 (as amended); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (Reissue) PARAS 1353, 1397-1400.

2 As to the Court of Appeal see COURTS vol 10 (Reissue) PARA 634 et seq.

3 I.e. at least one of whom is duly approved. As to such approval see PARA 482 ante.

4 Criminal Appeal Act 1968 s 14(1) (s 14 substituted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 4(2)). There are identical powers of disposal to those under the Criminal Appeal Act 1968 s 14 (as substituted and amended) in s 6 (as substituted and amended) although the latter are on any appeal against conviction: see PARA 499 note 11 ante; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARA 1883.

5 For these purposes, 'hospital order' has the meaning given in the Mental Health Act 1983 s 37 (as amended) (see PARA 491 note 5 ante); Criminal Appeal Act 1968 s 14(7) (s 14(2)-(7) substituted by the Domestic Violence, Crime and Victims Act 2004 s 24(3)).

6 Criminal Appeal Act 1968 s 14(2)(a) (as substituted: see note 4 supra). For these purposes, 'restriction order' has the meaning given in the Mental Health Act 1983 s 41 (as amended) (see PARA 496 note 7 ante); Criminal Appeal Act 1968 s 14(7) (as so substituted). See note 10 infra.

7 Ibid s 14(2)(b) (as substituted: see note 4 supra). For these purposes, 'supervision order' has the meaning given in the Criminal Procedure (Insanity) Act 1964 Sch 1A Pt 1 (as added) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 250); Criminal Appeal Act 1968 s 14(7) (as so substituted). See note 10 infra.

8 Ibid s 14(2)(d) (as substituted: see note 4 supra). See note 10 infra.

9 I.e. apart from ibid s 14(3) (as substituted).

10 Ibid s 14(3) (as substituted: see note 4 supra). The Criminal Procedure (Insanity) Act 1964 s 5A (as added) applies in relation to the Criminal Appeal Act 1968 s 14 (as substituted) as it applies in relation to the Criminal Procedure (Insanity) Act 1964 s 5 (as substituted) (see PARA 499 note 4 ante); Criminal Appeal Act 1968 s 14(4) (as so substituted). Where the court has not yet made one of the disposals referred to in s 14(2) (as substituted) (see heads (1)-(3) in the text) there are powers for the court to make orders for remand to hospital for report or treatment or an interim hospital order (see note 11 infra).

11 le by virtue of *ibid* s 14 (as substituted). 'Interim hospital order' has the meaning given in the Mental Health Act 1983 s 38 (as amended) (see PARA 491 note 19 ante): Criminal Appeal Act 1968 s 14(7) (as substituted: see note 4 *supra*).

12 *Ibid* s 14(5)(a) (as substituted: see note 4 *supra*).

13 le the Mental Health Act 1983 s 38(7) (see PARA 494 ante).

14 Criminal Appeal Act 1968 s 14(5)(b) (as substituted: see note 4 *supra*).

15 le by virtue of *ibid* s 14 (as substituted).

16 *Ibid* s 14(6) (as substituted: see note 4 *supra*).

UPDATE

500 Orders following acquittal on criminal appeal

TEXT AND NOTES 11-14--Criminal Appeal Act 1968 s 14(5) and the definition of 'interim hospital order' in s 14(7) omitted: Criminal Justice and Immigration Act 2008 Sch 8 para 7(c), Sch 28 Pt 3. As to the effect of interim hospital orders see Criminal Appeal Act 1968 s 30A (added by Criminal Justice and Immigration Act 2008 Sch 8 para 8).

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501. Additional powers of Secretary of State in respect of patients subject to restriction orders.

Where a person is subject to either a restriction order¹ or a restriction direction², the responsible medical officer³ must at such intervals (not exceeding one year) as the Secretary of State⁴ may direct, examine and report to the Secretary of State on that person: every report must contain such particulars as he may require⁵. If the Secretary of State is satisfied that a restriction order⁶ is no longer required for the protection of the public from serious harm, he may direct that the patient⁷ cease to be subject to the special restrictions applicable where such an order is in force⁸, and where he does so that order ceases to have effect⁹.

If satisfied that the attendance at any place in Great Britain¹⁰ of a patient who is subject to a restriction order is desirable in the interests of justice or for the purposes of any public inquiry, the Secretary of State may direct him to be taken to that place; and where a patient is so directed to be taken to any place he must, unless the Secretary of State directs otherwise, be kept in custody while being so taken, while at that place and while being taken back to the hospital in which he is liable to be detained¹¹.

The Secretary of State also has power to discharge a restricted patient either absolutely or conditionally¹², to recall a conditionally discharged patient to hospital¹³, and to refer the case of a restricted patient to a mental health review tribunal¹⁴. In certain circumstances he has a duty to refer the case to a review tribunal¹⁵.

1 Ie under the Mental Health Act 1983 s 41(1): see PARA 496 ante. For these purposes, a restriction order includes orders or directions having the same effect: see s 55(4); and PARA 488 ante.

2 Ie under *ibid* s 49: see PARA 537 post.

3 For the meaning of 'responsible medical officer' see PARA 489 note 19 ante.

4 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

5 Mental Health Act 1983 ss 41(6), 49(3).

6 See note 1 *supra*. This power applies whether the restriction order was made without limit of time or for a specified period.

7 For the meaning of 'patient' see PARA 435 ante.

8 Ie the special restrictions set out in the Mental Health Act 1983 s 41(3) (as amended) (which *inter alia* require the consent of the Secretary of State to the exercise of the power to grant leave of absence, transfer or discharge the patient, and give the Secretary of State power to recall a patient from leave and retake a patient who is absent without leave at any time): see PARAS 496 ante, 507 post.

9 *Ibid* s 42(1). As to the effect of such a direction where the hospital order does not cease to have effect see PARA 497 ante.

10 For the meaning of 'Great Britain' see PARA 406 note 18 ante.

11 Mental Health Act 1983 s 42(6). This provision extends to Scotland: see s 146 (prospectively amended); and PARA 405 ante. As to the provisions for taking such persons into custody see PARAS 446-447 ante.

12 *Ibid* s 42(2), (5). See PARA 524 post.

13 Ibid s 42(3), (4). See PARA 524 post.

14 Ibid s 71(1). See PARA 568 post.

15 See ibid ss 71(2), 75(1)(a); and PARA 568 post.

UPDATE

501 Additional powers of Secretary of State in respect of patients subject to restriction orders

NOTE 5--Mental Health Act 1983 ss 41(6), 49(3) amended: Mental Health Act 2007 s 10(6), (9)(b).

NOTE 13--See *R (on the application of MM) v Secretary of State for the Home Department* [2006] All ER (D) 332 (Nov) (Secretary of State recalled a patient, on the basis of an abundance of medical evidence, who had been conditionally released by a mental health review tribunal).

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502. Guardianship orders.

Where a person is convicted before the Crown Court¹ or a magistrates' court² of an offence in respect of which the court would have power to make a hospital order³, the court may make an order placing him under the guardianship of a local social services authority⁴ or of a specified person approved by such authority⁵, if the following conditions are fulfilled:

- 26 (1) the court is satisfied on the written or oral evidence of two registered medical practitioners⁶ that the offender is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment⁷ and that, in the case of an offender who has attained the age of 16 years, his mental disorder⁸ is of a nature or degree which warrants his reception into guardianship⁹; and
- 27 (2) the court is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of such an order¹⁰.

A guardianship order may not be made unless the court is satisfied that the local social services authority or person concerned is willing to receive the offender into guardianship¹¹. Where a court is minded to make a guardianship order, it may request a local social services authority¹² to inform the court whether it or any other person approved by it is willing to receive the offender into guardianship, and if so to give such information as it reasonably can about how it or the other person could be expected to exercise the powers of a guardian¹³ in relation to him, and the authority must comply with the request¹⁴.

1 As to the Crown Court see COURTS vol 10 (Reissue) PARA 621 et seq.

2 As to magistrates' courts see MAGISTRATES vol 29(2) (Reissue) PARA 583 et seq.

3 See the Mental Health Act 1983 s 37(1) (as amended); and PARA 491 ante. For the meaning of 'hospital order' see PARA 491 note 5 ante.

4 For the meaning of 'local social services authority' see PARA 424 ante.

5 Mental Health Act 1983 s 37(1). Such an order is referred to in the Mental Health Act 1983 as a 'guardianship order': see s 37(6); and PARA 486 note 14 ante. As to the application of the general provisions of the Act to guardianship orders see ss 40(4), 55(4), Sch 1 Pt I (as amended); and PARA 487 ante. For the documents to be sent by the court to the local social services authority see the Criminal Procedure Rules 2005, SI 2005/384, r 49.2.

6 As to the requirements for such evidence see PARA 492 ante. For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.

7 For the meanings of these terms see PARAS 402-403 ante. The order must specify the form or forms of mental disorder from which, on the medical evidence, the offender is found by the court to be suffering; and no order may be made unless the offender is described by each practitioner as suffering from the same form of disorder, whether or not he is also described as suffering from another: Mental Health Act 1983 s 37(7).

8 For the meaning of 'mental disorder' see PARA 402 ante.

9 Mental Health Act 1983 s 37(2)(a)(ii). As to hospital orders see s 37(2)(a)(i); and PARA 491 ante. As to the other orders which can and cannot be combined with a guardianship order see PARA 493 ante.

10 Ibid s 37(2)(b).

11 Ibid s 37(6).

12 le the local social services authority (see PARA 424 ante) for the area in which the offender resides or last resided, or any other such authority that appears to the court to be appropriate.

13 le the powers conferred by the Mental Health Act 1983 s 40(2): see PARA 503 post.

14 Ibid s 39A (added by the Criminal Justice Act 1991 s 27).

UPDATE

502 Guardianship orders

NOTE 5--SI 2005/384 r 49.2 replaced: Criminal Procedure Rules 2010, SI 2010/60, r 49.2.

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503. Effect of guardianship orders.

A guardianship order¹ confers on the authority or person named in it as guardian the same powers as a guardianship application² and the patient³ is to be treated⁴ as if he had been placed under guardianship on the date of the order in pursuance of such an application⁵. The most important distinction is that the patient's nearest relative has no power to order his discharge from guardianship⁶. A patient subject to a guardianship order and his nearest relative have the right to apply to a mental health review tribunal⁷.

When a person is placed under guardianship by a guardianship order, any previous application⁸, hospital order without a restriction order⁹, or guardianship order ceases to have effect¹⁰.

1 For the meaning of 'guardianship order' see PARA 486 note 14 ante. See also PARA 502 ante.

2 It is made and accepted under the Mental Health Act 1983 Pt II (ss 2-34) (as amended): s 40(2). As to those powers see s 8(1); and PARAS 471, 474-479 ante.

3 For the meaning of 'patient' see PARA 435 ante.

4 It is subject to the modification of certain provisions. The modifications are the same as those in relation to hospital orders without restrictions: see PARA 487 note 9 ante. For the meaning of 'hospital order' see PARA 491 note 5 ante.

5 Mental Health Act 1983 s 40(4), Sch 1 Pt I (amended by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 paras 6, 14).

6 Mental Health Act 1983 Sch 1 Pt I paras 2, 8 (Sch 1 Pt 1 para 2 amended by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 6(b)). As to orders for discharge see PARA 523 post.

7 See the Mental Health Act 1983 s 69(1)(b); and PARA 564 post. The nearest relative's right is different from that of the nearest relative of a hospital order patient: cf s 69(1)(a).

8 It is an application for admission or for guardianship under *ibid* Pt II (as amended): see PARA 460 et seq ante.

9 A hospital order does not cease to have effect so long as a restriction order is in force: *ibid* s 41(4).

10 *Ibid* s 40(5). As to the position where the order is quashed on appeal see PARA 494 note 14 ante.

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504. Appeals from the Crown Court.

An appeal lies to the Court of Appeal¹ in respect of any hospital order², with or without a restriction order³, or any interim hospital order⁴ or any hospital direction and limitation direction⁵ made by the Crown Court⁶ following conviction on indictment⁷. An appeal will also lie in respect of such orders made by the Crown Court following a summary conviction⁸. Where there is a special verdict that the accused is not guilty by reason of insanity, or there are findings that he is under a disability and that he did the act or made the omission charged against him⁹, the accused may appeal from the Crown Court to the Court of Appeal against the verdict or any of those findings¹⁰.

1 As to the Court of Appeal see COURTS vol 10 (Reissue) PARA 634 et seq.

2 Ie made under the Mental Health Act 1983 s 37(1) (as amended): see PARA 491 ante.

3 Ie made under ibid s 41(1): see PARA 496 ante.

4 Ie made under ibid s 38 (as amended): see PARA 491 ante.

5 Ie made under ibid ss 45A, 45B (both as added and amended): see PARA 490 ante.

6 As to the Crown Court see COURTS vol 10 (Reissue) PARA 621 et seq.

7 See the Criminal Appeal Act 1968 ss 9(1), 50(1)(a), (b) (bb) (amended by the Criminal Justice Act 1988 s 170(1), Sch 15 paras 20, 21; the Mental Health Act 1983 s 148(1), Sch 4 para 23(i); and the Crime (Sentences) Act 1997 s 55, Sch 4 para 6(1)(a)). An appeal lies only with the leave of the Court of Appeal unless the sentencing judge grants a certificate that the case is fit for appeal: see the Criminal Appeal Act 1968 s 11(1) (as amended), s 11(1A) (as added); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (Reissue) PARA 1352 et seq.

8 See ibid s 10(1), (2)(a) (amended by the Courts Act 1971 s 561, Sch 8 Pt II para 57(1)). There is no appeal to the Court of Appeal from proceedings in the Crown Court on appeal from magistrates' courts: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARA 1837 See also *Kiernan v Harrow Crown Court* [2003] EWCA Crim 1052.

9 As to the orders which may be made upon such verdict or findings see PARA 499 ante.

10 Criminal Appeal Act 1968 s 12 (amended by the Criminal Appeal Act 1995 s 1(3)); Criminal Appeal Act 1968 s 15 (amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 7, Sch 3 para 2; the Criminal Appeal Act 1968 s 15; the Criminal Appeal Act 1995 s 1(5); and the Domestic Violence Act 2004 s 58(1), Sch 10 para 4). Where the Court of Appeal allows an appeal against a finding that the appellant is under a disability (but not against a finding that he did the act or made the omission charged), he may be tried for the offence with which he was charged, and the court may (subject to the Criminal Justice and Public Order Act 1994 s 25 (as amended): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1150) make such orders as appear to it to be necessary or expedient pending any such trial for his custody, release on bail or continued detention under the Mental Health Act 1983, and the provisions of Pt III (ss 35-55) (as amended) will apply as provided by the Criminal Appeal Act 1968 Sch 3 (as amended) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARA 1886): see s 16(3) (substituted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 Sch 3 para 3; and amended by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 21).

UPDATE

504 Appeals from the Crown Court

TEXT AND NOTE 10--Criminal Appeal Act 1968 ss 12, 15 further amended: Criminal Justice and Immigration Act 2008 Sch 8 paras 4, 5.

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505. Appeals from magistrates' courts.

Where on the trial of an information charging a person with an offence a magistrates' court¹ makes a hospital order² or guardianship order³ in respect of him without convicting him⁴, he has the same right of appeal to the Crown Court⁵ against the order as if it had been made on his conviction⁶. On such an appeal, the Crown Court has the same powers as if the appeal had been against both conviction and sentence⁷.

1 As to magistrates' courts see MAGISTRATES vol 29(2) (Reissue) PARA 583 et seq.

2 For the meaning of 'hospital order' see PARA 491 note 5 ante.

3 For the meaning of 'guardianship order' see PARA 486 note 14 ante.

4 This will only be the case if the offender is found to be suffering from mental illness or severe mental impairment: see the Mental Health Act 1983 s 37(3); and PARA 491 note 3 ante.

5 As to the Crown Court see COURTS vol 10 (Reissue) PARA 621 et seq.

6 Mental Health Act 1983 s 45(1). As to rights of appeal to the Crown Court on conviction by a magistrates' court generally see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARA 1980.

7 Ibid s 45(1). As to the duty of the justices' chief executive to send notice to the appropriate officer of the Crown Court of written evidence considered when the magistrates' court made the order appealed against see the Magistrates' Courts Rules 1981, SI 1981/552, r 74 (as amended); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARA 1990; MAGISTRATES vol 29(2) (Reissue) PARA 883. As to appeals from magistrates' courts to the Crown Court generally see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARA 1980; MAGISTRATES.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(8) ABSENCE AND ESCAPE/506. Leave of absence from hospital.

(8) ABSENCE AND ESCAPE

506. Leave of absence from hospital.

The responsible medical officer¹ may grant, subject to the consent of the Secretary of State², any patient³ who is for the time being liable to be detained in a hospital⁴ under the Mental Health Act 1983⁵ leave to be absent from the hospital subject to such conditions, if any, as he considers necessary in the interests of the patient or for the protection of other persons⁶. Leave may be granted indefinitely⁷, or on specified occasions, or for any specified period; and where it is granted for a specified period, the period may be extended by further leave granted in the absence of the patient⁸. Where it appears to the responsible medical officer that it is necessary to do so in the interests of the patient or for the protection of other persons, he may, on granting leave of absence, direct that the patient must remain in custody⁹ during absence¹⁰. In this event the patient may be kept in the custody of any officer on the staff of the hospital concerned or of any other person authorised in writing by the managers of the hospital¹¹.

Where it appears to the responsible medical officer that it is necessary to do so in the interests of the patient's health or safety or for the protection of other persons, he may revoke any leave of absence which has been granted and recall the patient to hospital by notice in writing given to the patient or to the person for the time being in charge of the patient¹². However, a patient must not be so recalled after he has ceased to be liable to be detained¹³ under the Mental Health Act 1983¹⁴.

1 For the purposes of the Mental Health Act 1983 Pt II (ss 2-34) (as amended), 'responsible medical officer' (except in the phrase 'community responsible medical officer' (see PARA 529 post)) means: (1) in relation to a patient who is liable to be detained by virtue of an application for assessment or treatment or who is subject to after-care under supervision after leaving hospital (see PARA 528 et seq post), the registered medical practitioner (see PARA 460 note 13 ante) in charge of the treatment of the patient; (2) in relation to a patient subject to guardianship (see PARA 502 ante), the medical officer authorised by the local social services authority (see PARA 424 ante) to act, either generally or in any particular case or for any particular purpose, as the responsible medical officer (see PARA 489 note 19 ante): s 34(1) (definition amended by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 4(3)). In addition, nothing in the Mental Health Act 1983 prevents the same person from acting as more than one of the following in relation to a patient, namely the responsible medical officer, the community responsible medical officer (see PARA 529 post), and the supervisor: s 34(1A) (added by the Mental Health (Patients in the Community) Act 1995 Sch 1 para 4(5)). 'Supervisor', in relation to a patient subject to after-care under supervision, means the person who, in accordance with the Mental Health Act 1983 s 117(2A)(b) (as added and amended) (see PARAS 428 ante, 528 post), is supervising him: s 34(1) (definition added by the Mental Health (Patients in the Community) Act 1995 Sch 1 para 4(4)).

2 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante. See note 6 infra.

3 For the meaning of 'patient' see PARA 435 ante.

4 For the meaning of 'hospital' see PARA 417 ante.

5 Ie under the Mental Health Act 1983 Pt II (ss 2-34) (as amended). The provisions of s 17 (as amended) as to the grant etc of leave of absence also apply without modifications to hospital order patients who are not subject to special restrictions and with modifications to patients who are subject to special restrictions: see ss 40(4), 41(3), 55(4), Sch 1 Pt I para 1 (as amended), Sch 1 Pt II paras 2, 3 (as amended); and PARAS 487-488 ante.

6 Ibid s 17(1). Where the patient is subject to special restrictions, the responsible medical officer may only grant leave of absence with the consent of the Secretary of State: see ss 40(4), 55(4), Sch 1 Pt II paras 2, 3(a); and PARA 496 ante. See also note 12 infra.

The Secretary of State's consent should be given or refused in accordance with s 17 (as amended) and not by virtue of s 42 (see PARA 501 ante): see *R (on the application of A) v Secretary of State for the Home Department* [2002] EWHC 1618 (Admin), [2003] 1 WLR 330. The tribunal is not bound to discharge a patient on leave of absence under the Mental Health Act 1983 s 17 (as amended); and periods of absence from hospital are not inconsistent with continuing detention under the Mental Health Act 1983: see *R (on the application of S) v Mental Health Review Tribunal* [2004] EWHC 2958 (Admin), [2004] All ER (D) 87 (Dec). The grant of a leave of absence under the Mental Health Act 1983 s 17 (as amended) by the responsible medical officer of a patient requiring a stay in another hospital does not trigger an obligation on the part of the authority to fund the cost of the residence of the patient in the other institution during such period: see *R (on the application of K) v West London Mental Health NHS Trust* [2005] EWHC 1454 (Admin), [2005] All ER (D) 72 (Jul).

7 However, a patient absent on leave is not normally liable to recall to hospital after he has ceased to be liable to be detained under the Mental Health Act 1983 s 17 (as amended): see s 17(5); and the text and note 14 infra. See also *R (on the application of S) v Mental Health Review Tribunal* [2004] EWHC 2958 (Admin), [2004] All ER (D) 87 (Dec); and note 6 supra.

8 Mental Health Act 1983 s 17(2).

9 The custody will be legal custody, and any person authorised to keep the patient in custody will have all the powers, authorities, protection and privileges which a constable has in the area for which he acts as constable: see *ibid* s 137(1), (2); and PARA 446 ante. It is an offence to induce or knowingly to assist a patient to escape from legal custody: see s 128(2); and PARA 770 post.

10 *Ibid* s 17(3).

11 *Ibid* s 17(3). Where a patient is required as a condition imposed on the grant of leave of absence to reside in another hospital, the person having custody includes any officer on the staff of that other hospital: s 17(3). For the meaning of 'managers' see PARA 439 ante.

12 *Ibid* s 17(4). Where the patient is subject to special restrictions, the Secretary of State as well as the responsible medical officer may recall him to hospital: see ss 40(4), 41(3), 55(4), Sch 1 Pt II paras 2, 3(b). Leave of absence can only be revoked and the patient recalled to hospital if he needs to become an in-patient once again in the interests of his health or safety or for the protection of other persons; it is unlawful to recall a patient on leave simply to renew his detention under s 20 (see PARAS 518-520 post): *R v Gardner, ex p L, R v Hallstrom, ex p W* [1986] QB 1090, sub nom *R v Hallstrom, ex p W (No 2)* [1986] 2 All ER 306. The Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 5 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 127 et seq) requires up-to-date medical evidence of mental disorder to justify revocation of leave of absence: *K v United Kingdom* (1998) 40 BMLR 20.

13 *Ie* under the Mental Health Act 1983 Pt II (as amended). References to the provisions of Pt II (as amended) in the case of patients detained under Pt III (ss 35-55) (as amended) include those provisions to the extent that Pt II (as amended) applies to such patients: s 145(3).

14 *Ibid* s 17(5) (amended by the Mental Health (Patients in the Community) Act 1995 s 3(1)). Patients subject to special restrictions do not cease to be liable to be detained under these provisions: Mental Health Act 1983 s 41(3)(a), (d). Such patients may not be recalled by the responsible medical officer after the expiry of the 12 months' period, but they may be recalled by the Secretary of State at any time: ss 40(4), 41(3), 55(4), Sch 1 Pt II paras 2, 3(c) (amended by the Mental Health (Patients in the Community) Act 1995 s 3(2)). See generally para 496 ante. The provisions of the Mental Health Act 1983 Pt II (as amended) relating to after-care under supervision do not apply to a patient who is subject to special restrictions: see s 41(3)(aa) (as added); and PARA 496 ante.

UPDATE

506 Leave of absence from hospital

NOTE 1--Reference to responsible medical officer is now to responsible clinician which means (1) in relation to a patient liable to be detained by virtue of an application for admission for assessment or an application for admission for treatment, or a community patient, the approved clinician with overall responsibility for the patient's case; and (2) in relation to a patient subject to guardianship, the approved clinician authorised by the responsible local social services authority to act as the responsible clinician: Mental Health Act 1983 s 34(1) (added by Mental Health Act 2007 s 9(10)).

NOTES 6-12--Mental Health Act 1983 s 17(1), (3), (4) amended to refer to responsible clinician (see NOTE 1): Mental Health Act 2007 s 9(3).

NOTE 6--See *R (on the application of K) v West London Mental Health NHS Trust* [2006] EWCA Civ 118, [2006] 1 WLR 1865; and PARA 410 NOTE 4.

NOTE 8--As to the granting of longer-term leave of absence of a patient from hospital see the 1983 Act s 17(2A), (2B) (added by 2007 Act s 33(2)).

TEXT AND NOTES 10, 11--The 1983 Act s 17(7) applies to a person who is granted leave by or by virtue of a provision (1) in force in Scotland, Northern Ireland, any of the Channel Islands or the Isle of Man; and (2) corresponding to s 17(1): s 17(6) (s 17(6), (7) added by 2007 Act s 39(1)). For the purpose of giving effect to a direction or condition imposed by virtue of a provision corresponding to the 1983 Act s 17(3), the person may be conveyed to a place in, or kept in custody or detained at a place of safety in, England and Wales by a person authorised in that behalf by the direction or condition: s 17(7).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(8) ABSENCE AND ESCAPE/507. Return and readmission of patients absent without leave.

507. Return and readmission of patients absent without leave.

Where a patient¹ for the time being liable to be detained under the Mental Health Act 1983² in a hospital³: (1) absents himself from the hospital without leave⁴; or (2) fails to return to the hospital on any occasion on which, or at the expiration of any period for which, leave of absence was granted to him, or on being recalled to hospital⁵; or (3) absents himself without permission from any place where he is required to reside in accordance with conditions imposed on the grant of leave of absence⁶, he may, within certain limits of time⁷, be taken into custody⁸ and returned to the hospital or place⁹ by any approved social worker¹⁰, by any officer on the staff of the hospital¹¹, by any constable¹², or by any person authorised in writing by the managers of the hospital¹³.

A patient must not be taken into custody¹⁴ after the later of: (a) the end of the period of six months beginning with the first day of his absence without leave¹⁵; and (b) the end of the period for which¹⁶ he is liable to be detained or subject to guardianship¹⁷. In determining for the purpose of head (b) above or any other provision of the Mental Health Act 1983 whether a person who is or has been absent without leave is at any time liable to be detained or subject to guardianship, a report furnished¹⁸ before the first day of his absence without leave is not to be taken to have renewed the authority for his detention or guardianship unless the period of renewal began before that day¹⁹.

Patients liable to be detained for assessment²⁰ or as informal in-patients²¹ cannot be taken into custody²² once the maximum period for which they can be detained has expired²³.

A patient who may be taken into custody in England and Wales²⁴, may be taken into custody in, and returned to England and Wales from, any other part of the United Kingdom²⁵ or the Channel Islands or the Isle of Man²⁶.

1 For the meaning of 'patient' see PARA 435 ante.

2 Ie under the Mental Health Act 1983 Pt II (ss 2-34) (as amended). For patients who are subject to hospital orders but not subject to special restrictions, the provisions of s 18 (as amended) as to the return and readmission of patients absent without leave apply with the omission of s 18(5): see ss 40(4), 55(4), Sch 1 Pt I paras 2, 4 (as amended). For patients who are subject to special restrictions, the provisions of s 18(1), (2), (6) apply, but s 18(3)-(5) (as amended) are omitted: see ss 40(4), 41(3), 55(4), Sch 1 Pt II paras 2, 4 (as amended); and PARAS 487-488 ante.

3 For the meaning of 'hospital' see PARA 417 ante.

4 Mental Health Act 1983 s 18(1)(a). 'Absent without leave' means absent from any hospital or other place and liable to be taken into custody and returned under s 18(6); and related expressions must be construed accordingly: ss 18(6), 145(1). Section 18 (as amended) should be read in conjunction with s 21 (as substituted) and ss 21A-21B (as added) (see PARA 521 post). As to absence without leave from guardianship see PARA 477 ante. As to absconding from hospital during remand for report or for treatment see PARA 489 ante. As to absconding from hospital during an interim hospital order see PARA 494 ante. For the power to issue warrants for the arrest of convicted mental patients liable to be retaken under s 18 (as amended) see the Criminal Justice Act 1967 s 72 (as amended); and PARA 510 post. See *R (on the application of Ashworth Hospital Authority) v Mental Health Review Tribunal for West Midlands and Northwest Region* [2002] EWCA Civ 923, [2003] 1 WLR 127 (return of a patient to hospital granted following a stay on the discharge by the tribunal).

5 Mental Health Act 1983 s 18(1)(b). As to the power of recall see PARA 506 ante.

6 Ibid s 18(1)(c).

- 7 le the time limits laid down by *ibid* s 18(4), (5) (as amended): see the text and notes 14-26 *infra*.
 - 8 As to legal custody see *PARAS* 446-447 *ante*, 506 note 8 *ante*.
 - 9 le the place where he is required to reside in accordance with conditions imposed upon a grant of leave of absence: see the Mental Health Act 1983 s 18(1)(c).
 - 10 For the meaning of 'approved social worker' see *PARA* 427 *ante*.
 - 11 This refers to the hospital at which the patient is liable to be detained; but see note 13 *infra*.
 - 12 As to the office of constable see *POLICE* vol 36(1) (2007 Reissue) *PARA* 101 *et seq*.
 - 13 Mental Health Act 1983 s 18(1). For the meaning of 'managers' see *PARA* 439 *ante*. If the place where a patient is required to reside in accordance with conditions imposed upon his leave of absence is another hospital, references to an officer on the staff of the hospital and to the managers of the hospital include an officer and the managers of that hospital, in addition to the hospital at which he is liable to be detained: see s 18(2).
- Section 18 (as amended) applies to hospital (and guardianship) order patients who are not subject to special restrictions as it applies to patients admitted under Pt II (as amended) (see s 40(4), Sch 1 Pt I paras 2, 4 (as amended); and *PARAS* 487-488 *ante*); it does not apply to patients subject to special restrictions (see the Mental Health Act 1983 ss 40(4), 41(3), Sch 1 Pt II paras 2, 4 (as amended); and *PARAS* 487-488 *ante*).
- 14 le under *ibid* s 18 (as amended).
 - 15 *Ibid* s 18(4)(a) (s 18(4) substituted by the Mental Health (Patients in the Community) Act 1995 s 2(1)).
 - 16 le apart from the Mental Health Act 1983 s 21 (as substituted) (see *PARA* 521 *post*), which extends the authority for detention or guardianship.
 - 17 *Ibid* s 18(4)(b) (as substituted: see note 15 *supra*).
 - 18 le furnished under *ibid* s 21 (as substituted) or 21B (as added): see *PARA* 521 *post*.
 - 19 *Ibid* s 18(4) (as substituted: see note 15 *supra*).
 - 20 le for the periods specified in *ibid* ss 2(4), 4(4): see *PARAS* 460, 462 *ante*.
 - 21 le for the periods specified in *ibid* s 5(2), (4): see *PARA* 463 *ante*.
 - 22 le under *ibid* s 18 (as amended).
 - 23 *Ibid* s 18(5).
 - 24 le under *ibid* s 18 (as amended), or under that provision as applied by s 22 (as amended) (see *PARA* 522 *post*) to patients subject to imprisonment, or under s 138 (retaking patients escaping from custody: see *PARA* 447 *ante*). Powers of arrest under s 18 (as amended) are specifically preserved by the Police and Criminal Evidence Act 1984 s 26(2), Sch 2: see *CRIMINAL LAW, EVIDENCE AND PROCEDURE* vol 11(2) (2006 Reissue) *PARA* 927. For the meaning of 'England' see *PARA* 405 note 6 *ante*. For the meaning of 'Wales' see *PARA* 405 note 7 *ante*.
 - 25 For the meaning of 'United Kingdom' see *PARA* 406 note 18 *ante*.
 - 26 Mental Health Act 1983 s 88(1). The provisions of s 88 (as amended), and ss 18, 22 (as amended) and s 138 as applied by s 88 (as amended), extend to Scotland: see s 146 (prospectively amended); and *PARA* 405 *ante*. Section 88 (as amended) does not apply to any person who is subject to guardianship: s 88(4). For the purposes of the application of the provisions referred to in note 24 *supra* to Scotland, Northern Ireland, the Channel Islands or the Isle of Man, 'constable' includes a Scottish constable, an officer or constable of the Police Service of Northern Ireland, a member of the police in Jersey, an officer of police in Guernsey or a constable in the Isle of Man, as the case may be: s 88(2) (amended by the Police (Northern Ireland) Act 2000 s 78(2)(b)). For the purposes of their application to Scotland or Northern Ireland, any reference in those provisions to an approved social worker must be construed as including a reference: (1) in Scotland, to any mental health officer within the meaning of the Mental Health (Care and Treatment) (Scotland) Act 2003; and (2) in Northern Ireland, to an approved social worker within the meaning of the Mental Health (Northern Ireland) Order 1986, SI 1986/595 (as amended): Mental Health Act 1983 s 88(3) (amended by the Mental Health (Northern Ireland Consequential Amendments) Order 1986, SI 1986/596, art 2; and the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 15, Sch 1 para 2(1), (5)).

UPDATE

507 Return and readmission of patients absent without leave

TEXT AND NOTES 1-23--Provision is also made under the Mental Health Act 1983 s 18 in relation to a community patient who is at any time absent from a hospital to which he is recalled under the Mental Health Act 1983 s 17E (see PARA 528A): see s 18(2A), (4)-(4B) (s 18(2A), (4A), (4B) added, s 18(4) amended, by Mental Health Act 2007 Sch 3 para 3(2)-(4)).

In relation to a patient who has yet to comply with a requirement imposed by virtue of the Mental Health Act 1983 to be in a hospital or place, references in the Act to his liability to be returned to the hospital or place include his liability to be taken to that hospital or place; and related expressions are to be construed accordingly: s 18(7) (added by Mental Health Act 2007 Sch 3 para 3(5)).

TEXT AND NOTE 10--Reference to an approved social worker now to an approved mental health professional: Mental Health Act 1983 s 18(1) (amended by Mental Health Act 2007 Sch 2 para 7(a)).

NOTE 26--Mental Health Act 1983 s 88 repealed: Adult Support and Protection (Scotland) Act 2007 s 74.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(8) ABSENCE AND ESCAPE/508. Patients absent from hospitals in Scotland.

508. Patients absent from hospitals in Scotland.

Any person who may be taken into custody in Scotland under certain provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003¹, may be taken into custody in, and returned to Scotland from, any other part of the United Kingdom².

1 le under the Mental Health (Care and Treatment) (Scotland) Act 2003 ss 301-303 (absconding) or under regulations made under s 290 (cross-border transfer: patients subject to detention requirement or otherwise in hospital) or s 310 (regulations as to absconding by certain patients).

2 Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 8(1). For the meaning of 'United Kingdom' see PARA 406 note 18 ante. For the purposes of the provisions referred to in note 1 supra in their application to England and Wales, 'constable' includes a constable in England and Wales, and 'mental health officer' includes any approved social worker within the meaning of the Mental Health Act 1983 (see PARA 427 ante); Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 8(2). For the meaning of 'England' see PARA 405 note 6 ante. For the meaning of 'Wales' see PARA 405 note 7 ante.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(8) ABSENCE AND ESCAPE/509. Persons absent from institutions in Northern Ireland, the Channel Islands or the Isle of Man.

509. Persons absent from institutions in Northern Ireland, the Channel Islands or the Isle of Man.

Any person who may be taken into custody in Northern Ireland, under the provisions for retaking patients absent without leave¹ or patients escaping from custody² or under the special provisions as to persons sentenced to imprisonment³, may be taken into custody in, and returned to Northern Ireland from, England and Wales⁴ by an approved social worker⁵, by any constable or by any person authorised by or by virtue of the Mental Health (Northern Ireland) Order 1986⁶.

Any person who may be taken into custody in any of the Channel Islands or the Isle of Man, under any provision corresponding to those in the Mental Health Act 1983 for retaking patients absent without leave⁷ or patients escaping from legal custody⁸, may be taken into custody in, and returned to the island in question from, England and Wales by an approved social worker or a constable⁹.

1 Ie under the Mental Health (Northern Ireland) Order 1986, SI 1986/595 (NI 4), art 29.

2 Ie under ibid art 132.

3 Ie under ibid art 29 as applied by art 31.

4 For the meaning of 'England' see PARA 405 note 6 ante. For the meaning of 'Wales' see PARA 405 note 7 ante.

5 For the meaning of 'approved social worker' see PARA 427 ante.

6 Mental Health Act 1983 s 87(1) (amended by the Mental Health (Northern Ireland Consequential Amendments) Order 1986, SI 1986/596, art 2). This provision does not apply to persons subject to guardianship: Mental Health Act 1983 s 87(2).

7 Ie ibid s 18 (as amended): see PARA 507 ante.

8 Ie ibid s 138: see PARA 447 ante.

9 Ibid s 89(1). This provision does not apply to any person who is subject to guardianship: s 89(2).

UPDATE

509 Persons absent from institutions in Northern Ireland, the Channel Islands or the Isle of Man

TEXT AND NOTES--References to an approved social worker now to an approved mental health professional: Mental Health Act 1983 ss 87(1), 89(1) (amended by Mental Health Act 2007 Sch 2 para 7(f), (h)).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(8) ABSENCE AND ESCAPE/510. Warrants for the arrest of escaped convicted mental patients.

510. Warrants for the arrest of escaped convicted mental patients.

On an information in writing being laid before a justice of the peace for any area and substantiated on oath, alleging that any person is a convicted mental patient¹ liable to be retaken under the statutory provisions relating to the retaking of mental patients who are absent without leave or have escaped from custody², the justice may issue a warrant to arrest him and bring him before a magistrates' court for that area³. Where a person is brought before a magistrates' court in pursuance of a warrant for his arrest under this provision, the court must, if satisfied that he is the person named in the warrant and that he is such a convicted mental patient, order him to be returned to the institution where he is required or liable to be detained or order him to be kept in custody or detained in a place of safety⁴ pending his admission to hospital⁵.

1 'Convicted mental patient' means a person liable after being convicted of an offence to be detained under the Mental Health Act 1983 Pt III (ss 35-55) (as amended) (see PARAS 491 et seq ante, 535 et seq post) or the equivalent Scottish or Northern Ireland provisions, in pursuance of a hospital order or transfer direction together with an order or direction restricting his discharge, or in pursuance of a hospital direction and a limitation direction (see PARA 490 ante), or a person liable to be detained under s 38 (as amended) (see PARA 491 ante) or the equivalent Northern Ireland provision: see the Criminal Justice Act 1967 s 72(4) (definition amended by the Mental Health (Amendment) Act 1982 s 65(1), Sch 3 Pt I para 35; the Mental Health Act 1983 s 148(1), (2), Sch 4 para 21; the Mental Health (Scotland) Act 1984 s 127(1), Sch 3 para 9; the Crime (Sentences) Act 1997 s 55, Sch 4 para 5(2); and the Mental Health (Northern Ireland Consequential Amendments) Order 1986, SI 1986/596, art 5).

2 Ie under the Mental Health Act 1983 ss 18, 38(7), 138 (as amended) or the equivalent Scottish or Northern Ireland provisions (see PARAS 447, 507-508 ante).

3 See the Criminal Justice Act 1967 s 72(1) (s 72(1), (3) amended by the Mental Health Act 1983 Sch 4 para 21; the Mental Health (Scotland) Act 1984 Sch 3 para 9; and the Mental Health (Northern Ireland Consequential Amendments) Order 1986, SI 1985/596, art 5). The main purpose of this provision is to facilitate the recovery of prisoners and convicted mental patients who have absconded to the Republic of Ireland, where extradition may be sought provided that an arrest warrant has been obtained from a judicial authority: see 283 HL Official Report (5th series) col 778 (12 June 1967).

4 'Place of safety' has the same meaning as in the Mental Health Act 1983 Pt III (as amended) (see PARA 495 note 4 ante): Criminal Justice Act 1967 s 72(4) (definition amended by the Mental Health Act 1983 Sch 4 para 21).

5 Criminal Justice Act 1967 s 72(2). The provisions relating to the custody, conveyance and detention of certain mental patients (ie the Mental Health Act 1983 s 137 and the equivalent Scottish and Northern Ireland provisions: see PARA 447 ante) apply to a convicted mental patient required by this provision to be conveyed to any place or to be kept in custody or detained in a place of safety: see the Criminal Justice Act 1967 s 72(3) (as amended: see note 3 supra).

UPDATE

510 Warrants for the arrest of escaped convicted mental patients

NOTES--References in the Criminal Justice Act 1967 s 72 to offences include service offences within the meaning of the Armed Forces Act 2006 (see ARMED FORCES vol 2(2) (Reissue) PARA 451): Criminal Justice Act 1967 s 72(6) (added by the Armed Forces Act 2006 Sch 16 para 49).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(9) TRANSFER OF PATIENTS/511. Regulations as to the transfer of patients.

(9) TRANSFER OF PATIENTS

511. Regulations as to the transfer of patients.

The Secretary of State¹ may make regulations² prescribing the circumstances in which, and the conditions subject to which, patients³ who are liable to be detained⁴ or subject to guardianship under the general provisions as to compulsory admission to hospital and guardianship⁵ may be transferred from one hospital⁶ to another or from the guardianship of one authority or person to that of another, or from hospital to guardianship or vice versa⁷.

1 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

2 See the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, regs 7-9 (as amended); and PARAS 512-516 post.

3 For the meaning of 'patient' see PARA 435 ante.

4 Ie whether for assessment or for treatment.

5 Ie under the Mental Health Act 1983 Pt II (ss 2-34) (as amended). See, in particular, ss 2-4, 7; and PARAS 460-462, 469 ante.

6 In this context, 'hospital' includes a registered establishment: see PARA 417 ante.

7 Mental Health Act 1983 s 19(1). For patients subject to hospital orders but not subject to special restrictions, s 19(1) applies without modification: see ss 40(4), 55(4), Sch 1 Pt I paras 2, 5 (as amended); and see PARAS 487-488 ante. For patients who are subject to special restrictions, whether under restriction orders (see PARA 496 ante), orders for committal to hospital (see PARA 498 ante), admission orders with restrictions (see PARA 499 ante), directions for detention in hospital (see PARA 499 ante) or transfer directions with restrictions (see PARA 537 post), s 19(1) is modified so that the consent of the Secretary of State is required before a patient can be transferred from one hospital to another and references to transfers to and from guardianship are omitted: see ss 40(1), 41(3), 55(4), Sch 1 Pt II paras 2, 5 (as amended); and see PARAS 487-488 ante. See further PARA 517 post.

UPDATE

511-516 Regulations as to the transfer of patients ... Conveyance to hospital

SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184 (amended by SI 2008/2560, SI 2009/462); Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439.

511 Regulations as to the transfer of patients

TEXT AND NOTES--Responsibility for a community patient may be assigned to another hospital in such circumstances and subject to such conditions as may be prescribed by regulations made by the Secretary of State or the Welsh Ministers: Mental Health Act 1983 s 19A (added by Mental Health Act 2007 Sch 3 para 4).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(9) TRANSFER OF PATIENTS/512. Authority for transfer from hospital to hospital or guardianship.

512. Authority for transfer from hospital to hospital or guardianship.

The authority for transfer from hospital¹ to hospital or guardianship must be given in the prescribed form² by the managers³ of the hospital in which the patient⁴ is liable to be detained or by an officer of the managers authorised⁵ by them in that behalf⁶. In the case of a patient liable to be detained in a registered establishment⁷, such authority may also be given by the registration authority⁸ of the establishment, and, in the case of such a patient maintained in such an establishment under contract with a strategic health authority, health authority, primary care trust or special health authority⁹, by an officer of the authority or trust authorised by it in that behalf¹⁰.

In the case of a transfer from hospital to hospital, the authority for transfer must not be given unless the person giving it is satisfied that arrangements have been made for the admission of the patient to the receiving hospital within a period of 28 days beginning with the date of the authority¹¹.

In the case of transfer from hospital to guardianship¹², the authority is of no effect until it has been confirmed by the local social services authority which will be the responsible local social services authority¹³ if the proposed transfer takes effect¹⁴; and, if the guardian is to be a person other than a local social services authority, the authority for transfer may not be confirmed without the agreement of that person¹⁵.

No authority for transfer is required if the patient is to be transferred from one hospital to another hospital¹⁶ under the same management¹⁷ or from one registered establishment to another under the same management¹⁸. Nor is any such authority required where the Secretary of State gives a direction for the transfer of a patient from one hospital at which high security psychiatric services are provided¹⁹ to another hospital at which such services are provided²⁰ or from such a hospital to another hospital²¹.

1 For the meaning of 'hospital' see PARA 417 ante.

2 Mental Health Act 1983 s 19(1); Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 7(2), (3), Sch 1 Forms 24, 25 (Sch 1 Form 24 substituted by SI 1996/540).

3 For the meaning of 'managers' see PARA 439 ante.

4 For the meaning of 'patient' see PARA 435 ante.

5 Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, regs 3(6), 7(5).

6 Ibid reg 7(1)-(3).

7 The regulations refer to mental nursing homes, but these are now known as registered establishments. For the meaning of 'registered establishment' see PARA 421 ante.

8 As to the registration authority see the Care Standards Act 2000; and SOCIAL SERVICES AND COMMUNITY CARE.

9 For the meaning of 'strategic health authority' see PARA 439 note 6 ante. For the meanings of 'health authority' and 'primary care trust' see PARA 414 note 6 ante. For the meaning of 'special health authority' see PARA 410 note 10 ante.

10 Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 7(4)(b) (amended by SI 2002/2469).

11 Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 7(2)(b). See also PARA 511 note 7 ante.

12 Restricted patients cannot be transferred into guardianship: see PARA 511 note 7 ante.

13 For the meaning of 'responsible local social services authority' see PARA 475 note 1 ante.

14 Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 7(3)(b). When confirming an authority, the local social services authority must specify the date on which it is to take effect: reg 7(3)(c).

15 Ibid reg 7(3)(d).

16 Is whether vested in the Secretary of State or in an NHS trust, NHS foundation trust or primary care trust. As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante. As to NHS trusts and NHS foundation trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq.

17 Mental Health Act 1983 s 19(3) (amended by the National Health Service and Community Care Act 1990 s 66(1), Sch 9 para 24(2); the Health and Social Care (Community Health and Standards) Act 2003 s 34, Sch 4 paras 50, 52; and the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 para 16(1), (3)). See also the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 7(1).

The Mental Health Act 1983 s 19(3) (as amended) is modified in relation to patients who are subject to special restrictions: see Sch 1 Pt II para 5(c); and PARA 487 note 12 ante.

18 Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 7(4)(a).

19 As to such transfers see PARA 517 post. The regulations refer to special hospitals, but these are now known as hospitals at which high security psychiatric services are provided. As to hospitals providing high security psychiatric services generally see PARAS 418-420 ante.

20 Mental Health Act 1983 s 123 (amended by the Health Act 1999 s 65, Sch 4 paras 65, 67); Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 7(1).

21 Mental Health Act 1983 s 123 (as amended: see note 20 supra); Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 7(1).

UPDATE

511-516 Regulations as to the transfer of patients ... Conveyance to hospital

SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184 (amended by SI 2008/2560, SI 2009/462); Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439.

512 Authority for transfer from hospital to hospital or guardianship

TEXT AND NOTE 9--In relation to Wales, references to a health authority are to be treated as references to a local health board: see the References to Health Authorities Order 2007, SI 2007/961.

TEXT AND NOTE 17--1983 Act s 19(3) further amended: National Health Service (Consequential Provisions) Act 2006 Sch 1 para 64; Mental Health Act 2007 s 46(2).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(9) TRANSFER OF PATIENTS/513. Authority for transfer from guardianship to guardianship.

513. Authority for transfer from guardianship to guardianship.

The authority for transfer from guardianship to guardianship must be given in the prescribed form¹ by the guardian from whose care the patient² is to be transferred³. It is of no effect until it is confirmed by the local social services authority which will be the responsible local social services authority⁴ if the proposed transfer takes effect⁵ and, if the guardian is to be a person other than a local social services authority, the authority for transfer may not be confirmed without the agreement of that person⁶.

1 Mental Health Act 1983 s 19(1)(b); Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 8(2), Sch 1 Form 26.

2 For the meaning of 'patient' see PARA 435 ante.

3 Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 8(1), (2)(a).

4 For the meaning of 'responsible local social services authority' see PARA 475 note 1 ante.

5 Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 8(2) (b). That authority when confirming must specify the date on which it is to take effect: reg 8(2)(c).

6 Ibid reg 8(2)(d).

UPDATE

511-516 Regulations as to the transfer of patients ... Conveyance to hospital

SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184 (amended by SI 2008/2560, SI 2009/462); Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(9) TRANSFER OF PATIENTS/514. Authority for transfer from guardianship to hospital.

514. Authority for transfer from guardianship to hospital.

The authority for transfer from guardianship to hospital¹ must be given in the prescribed form² by the responsible local social services authority³. No such authority may be given unless: (1) an application for admission for treatment⁴ has been made by an approved social worker⁵ in the prescribed form⁶; (2) that application is founded upon two medical recommendations or a joint medical recommendation in the prescribed forms⁷; (3) that application has been accepted by the managers⁸ of the hospital to which it was addressed and the responsible local social services authority is satisfied that arrangements have been made for the admission of the patient to that hospital within the period of 14 days beginning with the date of the authority for transfer⁹; and (4) the responsible local social services authority has taken such steps as are practicable to inform the person (if any) appearing to be the patient's nearest relative¹⁰ of the proposed transfer¹¹. A patient¹² who is thus transferred has the right to apply to a mental health review tribunal¹³ once¹⁴ within the period of six months beginning with the day on which he is so transferred¹⁵. If he does not exercise this right, the hospital managers must, at the expiration of such period, automatically refer his case to the tribunal¹⁶.

1 For the meaning of 'hospital' see PARA 417 ante.

2 Mental Health Act 1983 s 19(1)(b); Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 8(3), Sch 1 Form 27.

3 Ibid reg 8(1), (3). For the meaning of 'responsible local social services authority' see PARA 475 note 1 ante.

4 As to admission for treatment see PARA 461 ante.

5 For the meaning of 'approved social worker' see PARA 427 ante.

6 Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 8(3) (a), Sch 1 Form 9 (Sch 1 Form 9 substituted by SI 1996/540). For this purpose, the provisions of the Mental Health Act 1983 s 11(4) (consultation with nearest relative) and s 13 (duty of approved social worker) (see PARA 451 ante) apply as if the proposed transfer were an application for admission for treatment.

7 Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 8(3) (b), Sch 1 Forms 28, 29 (Sch 1 Forms 28, 29 substituted by SI 1996/540).

8 For the meaning of 'managers' see PARA 439 ante.

9 Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 8(3) (c).

10 As to the nearest relative see PARA 453 ante.

11 Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 8(3)(d). On the transfer of the patient, a record of admission must be made by the managers of the hospital (or an officer authorised by them in that behalf) in the prescribed form and attached to the application: regs 3(6), 8(3), Sch 1 Form 14 (Sch 1 Form 14 substituted by SI 1996/540).

12 For the meaning of 'patient' see PARA 435 ante.

13 As to applications to a mental health review tribunal see PARA 564 post.

14 Any withdrawn application is disregarded: see the Mental Health Act 1983 s 77(2).

15 Ibid s 66(1)(e), (2)(e).

16 Ibid s 68(1). See PARA 567 post.

UPDATE

511-516 Regulations as to the transfer of patients ... Conveyance to hospital

SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184 (amended by SI 2008/2560, SI 2009/462); Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439.

514 Authority for transfer from guardianship to hospital

NOTE 14--As to the Mental Health Act 1983 s 77(2), see PARA 563.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(9) TRANSFER OF PATIENTS/515. Effect of transfer.

515. Effect of transfer.

Where a patient¹ is transferred in pursuance of the regulations for that purpose², the effect is that in the case of transfer from hospital³ to hospital the patient is treated as if he had been admitted to the receiving hospital on the same day as that on which he was originally admitted to the sending hospital and by virtue of the same application as that which authorised his admission to the sending hospital⁴. If he is transferred from hospital to guardianship he is treated as if received into guardianship when originally admitted to hospital, the application for admission to hospital being treated as if it had been a guardianship application⁵. If he is transferred from guardianship to hospital he is similarly treated as if admitted to hospital at the time when the guardianship application was accepted and as if that application had been an application for admission to hospital for treatment⁶. In the case of transfer from guardianship to guardianship, he is treated as if his reception into the later guardianship had been authorised by the same guardianship application as authorised the earlier guardianship and on the same date⁷.

These provisions⁸ are modified in relation to patients who are subject to hospital orders⁹ or to special restrictions¹⁰.

1 For the meaning of 'patient' see PARA 435 ante.

2 As to the regulations see PARAS 511-514 ante.

3 For the meaning of 'hospital' see PARA 417 ante.

4 Mental Health Act 1983 s 19(2)(a). The dates at which the authority for detention (or guardianship) will expire under s 20 unless renewed continues to be calculated from the date of the original admission, notwithstanding any transfer: see PARAS 518-519 post.

5 Ibid s 19(2)(b).

6 Ibid s 19(2)(d). He is so treated notwithstanding the fact that the transfer itself involves medical recommendations additional to those on which the original application was founded.

7 Ibid s 19(2)(c). Where guardianship is transferred to the local social services authority (see PARA 424 ante) or other person by reason of the death, resignation or incapacity of the guardian or by the county court on the ground that the guardian has performed his functions negligently or in a manner contrary to the patient's interests, this provision applies to the patient as if he had been transferred into the later guardianship in pursuance of the regulations for that purpose: s 10(4); and see PARAS 478-479 ante.

8 I.e. the provisions of ibid s 19(2): see the text and notes 2-7 supra.

9 In relation to a patient in respect of whom a hospital order without restrictions (see PARA 491 ante), a transfer direction without restrictions (see PARAS 535-536 post) or a guardianship order (see PARA 502 ante) has been made, the provisions of ibid s 19(2) have effect as if the order or direction by which he was liable to be detained or subject to guardianship before being transferred were an order or direction for his admission or removal to the hospital to which he is transferred or placing him under the guardianship of the authority or person into whose guardianship he is transferred, as the case may be: see ss 40(4), 55(4), Sch 1 Pt I paras 2, 5 (as amended); and PARAS 487-488 ante.

10 In relation to a patient in respect of whom a restriction order (see PARA 496 ante), an order for committal to hospital (see PARA 498 ante), an admission order with a restriction direction (see PARA 499 ante), a direction for detention in hospital (see PARA 499 ante) or a transfer direction with restrictions (see PARA 537 post) has been made or given, the provisions of ibid s 19(2) have effect as if the order or direction by which he was liable to be detained before being transferred were an order or direction for his admission or removal to the hospital

to which he is transferred: see ss 40(4), 41(3), 55(4), Sch 1 Pt II paras 2, 5(b) (as amended); and PARAS 487-488 ante. As to the transfer of restricted patients see further PARA 517 post.

UPDATE

511-516 Regulations as to the transfer of patients ... Conveyance to hospital

SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184 (amended by SI 2008/2560, SI 2009/462); Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(9) TRANSFER OF PATIENTS/516. Conveyance to hospital.

516. Conveyance to hospital.

The authority for transfer, or a direction of the Secretary of State¹ in the case of a patient² to be transferred from a hospital at which high security psychiatric services are provided to a hospital³, confers authority on prescribed officers or persons within prescribed limits of time to convey the patient for the purposes of the transfer⁴. Where the hospitals or registered establishments⁵ concerned are under the same management and no authority for transfer is therefore required, the regulations confer authority for conveyance on an officer or person authorised by the managers⁶.

1 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

2 For the meaning of 'patient' see PARA 435 ante.

3 See the Mental Health Act 1983 s 123(2) (as amended); and PARA 517 post. For the meaning of 'hospital' see PARA 417 ante; and as to hospitals providing high security psychiatric services generally see PARAS 418-420 ante.

4 Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 9. In the case of a transfer from hospital to hospital, the authority to take the patient and convey him to the receiving hospital is effective for 28 days beginning with the date of the authority for transfer: reg 9(1)(a). In the case of transfer from guardianship to hospital, the period is 14 days beginning with the date on which the patient was last examined by a medical practitioner before giving a medical recommendation for the purpose of the authority for transfer: reg 9(1)(b).

5 The regulations refer to mental nursing homes, but these are now known as registered establishments. For the meaning of 'registered establishment' see PARA 421 ante.

6 See the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, regs 7(4)(a), 9(3). For the meaning of 'managers' see PARA 439 ante.

UPDATE

511-516 Regulations as to the transfer of patients ... Conveyance to hospital

SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184 (amended by SI 2008/2560, SI 2009/462); Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(9) TRANSFER OF PATIENTS/517. Restricted patients and patients in hospitals providing high security services.

517. Restricted patients and patients in hospitals providing high security services.

In the case of a patient¹ who is subject to special restrictions², the consent of the Secretary of State³ must be obtained to transfer the patient from hospital to hospital, and transfers from hospital to guardianship are not possible⁴.

Without prejudice to any other provisions⁵ with respect to the transfer of patients, any patient who is liable to be detained⁶ in a hospital at which high security psychiatric services are provided⁷ may, upon the directions of the Secretary of State, be removed into another such hospital⁸ or transferred into a hospital which is not a hospital at which such services are provided⁹.

1 For the meaning of 'patient' see PARA 435 ante.

2 Ie whether under a restriction order (see PARA 496 ante), an order for committal to hospital (see PARA 498 ante), an admission order with a restriction direction (see PARA 499 ante), a direction for detention in hospital (see PARA 499 ante), or a transfer direction with restrictions (see PARA 537 post).

3 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante. As to the Secretary of State's duty to act fairly when deciding whether to consent to a transfer see *R v Secretary of State for the Home Department, ex p Harry* [1998] 3 All ER 360, [1998] 1 WLR 1737 (patient denied opportunity of making written representations).

4 See the Mental Health Act 1983 ss 40(4), 41(3)(c)(ii), 55(4), Sch 1 Pt II paras 2, 5 (as amended); and PARAS 487-488 ante.

5 Ie provisions of the Mental Health Act 1983.

6 Ie other than under ibid ss 35, 36 (remand to hospital for report or for treatment) or s 38 (as amended) (interim hospital orders): see PARAS 489-491 ante.

7 As to hospitals at which high security psychiatric services are provided see PARAS 418-420 ante.

8 Mental Health Act 1983 s 123(1) (s 123(1), (2) amended by the Mental Health Act 1999 s 65, Sch 4 paras 65, 67).

9 Mental Health Act 1983 s 123(2) (as amended: see note 8 supra). The provisions of the Mental Health Act 1983 s 19(2), (4) (see PARAS 515-516 ante) apply to such transfer or removal as they do to the transfer or removal of a patient from hospital to hospital under s 19 (as amended): s 123(3).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(10) DURATION, DISCHARGE (OTHER THAN BY TRIBUNAL) AND RECLASSIFICATION/518. Duration of authority for detention or guardianship.

(10) DURATION, DISCHARGE (OTHER THAN BY TRIBUNAL) AND RECLASSIFICATION

518. Duration of authority for detention or guardianship.

Subject to certain exceptions, a patient¹ admitted to hospital² in pursuance of an application for admission for treatment³, a hospital order without restrictions⁴, an admission order without restrictions⁵ or a transfer direction without restrictions⁶ and a patient placed under guardianship in pursuance of a guardianship application⁷ or order⁸ may be detained in a hospital or kept under guardianship for a period not exceeding six months beginning with the day of admission or of acceptance of the guardianship application or of the order or direction⁹, as the case may be, but not for any longer period unless the authority for his detention or guardianship is renewed¹⁰. The exceptions relate to patients absent without leave¹¹ or in prison¹².

Where a patient liable to be detained or subject to guardianship by virtue of an application, order or direction¹³ is removed from England and Wales¹⁴ in pursuance of the arrangements for the removal of patients¹⁵, the application, order or direction ceases to have effect when he is duly received into a hospital or other institution, or placed under guardianship or, where he is not received into a hospital but his detention in hospital is authorised¹⁶, in pursuance of those arrangements¹⁷.

1 For the meaning of 'patient' see PARA 435 ante.

2 For the meaning of 'hospital' see PARA 417 ante.

3 As to compulsory admission for treatment see PARA 461 ante. As to the duration of authority for detention in the case of admission for assessment or assessment in an emergency see the Mental Health Act 1983 ss 2(4), 4(4); and PARAS 460, 462 ante.

4 As to hospital orders see PARA 491 ante; and as to restriction orders see PARA 496 ante. For the duration of remands to hospital for report or treatment and of interim hospital orders see *ibid* ss 35(7), 36(6), 38(5) (as amended); and PARAS 489-491 ante.

5 As to admission orders see PARA 499 ante.

6 As to transfer directions see PARAS 535-536 post.

7 As to compulsory guardianship see PARA 469 ante.

8 As to guardianship orders see PARA 502 ante.

9 In the application of the Mental Health Act 1983 s 20(1) to patients with respect to whom a hospital order without restrictions (see PARA 491 ante), an admission order without restrictions (see PARA 499 ante), a transfer direction without restrictions (see PARAS 535-536 post) or a guardianship order (see PARA 502 ante) has been made, for the reference to the days of admission or of acceptance of guardianship there is to be substituted a reference to the date of the relevant order or direction under Pt III (ss 35-55) (as amended): see ss 40(4), 55(4), Sch 1 Pt I paras 2, 6; and PARAS 487-488 ante.

10 *Ibid* s 20(1). The authority for detention of a patient also ceases to be effective after he has ceased to be liable for detention under Pt II (ss 2-34) (as amended) (see s 17(5) (as amended); and PARA 506 ante); and the authority for detention or for guardianship of a patient (except in the case of a patient subject to restrictions: see s 41(3)(a), (d); and PARA 496 ante) ceases to be effective if he is absent without leave for the later of six months or the period he is liable to be detained or subject to guardianship (see s 18(4) (as amended), ss 40(4),

55(4), Sch 1 Pt I paras 2, 4; and PARAS 477, 507 ante). There is no common law power to detain once the statutory period has expired: *B v Forsey* 1988 SLT 572, HL.

11 le subject to the rule in the Mental Health Act 1983 s 18(4) (as amended): see note 10 supra. See s 21 (as substituted), ss 21A-21B (as added); and PARA 521 post.

12 See s 22 (as amended); and PARA 522 post.

13 le under ibid Pt II (as amended), Pt III (as amended) or Pt VI (ss 80-92) (as amended).

14 For the meaning of 'England' see PARA 405 note 6 ante. For the meaning of 'Wales' see PARA 405 note 7 ante.

15 le arrangements made under the Mental Health Act 1983 Pt VI (as amended): see PARA 542 et seq post.

16 le authorised by virtue of the Mental Health (Care and Treatment) (Scotland) Act 2003 or the Criminal Procedure (Scotland) Act 1995. Reference in the Mental Health Act 1983 s 91 (as amended) to a patient's detention in hospital being authorised by virtue of the Mental Health (Care and Treatment) (Scotland) Act 2003 or the Criminal Procedure (Scotland) Act 1995 is to be read as including references to a patient in respect of whom a certificate under one of the provisions listed in the Mental Health (Care and Treatment) (Scotland) Act 2003 s 290(7)(a) is in operation: Mental Health Act 1983 s 91(3) (added by the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 15, Sch 1 para 2(1), (7)(b)).

17 Mental Health Act 1983 s 91(1) (amended by the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), Sch 1 para 2(1), (7)(a)).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(10) DURATION, DISCHARGE (OTHER THAN BY TRIBUNAL) AND RECLASSIFICATION/519. Renewal of authority for detention or guardianship.

519. Renewal of authority for detention or guardianship.

Unless the patient¹ has previously been discharged², the authority for detention or guardianship may be renewed: (1) from the expiration of the period of six months³ for a further period of six months⁴; and (2) from the expiration of any such period of renewal for a further period of one year, and so on for periods of one year at a time⁵.

1 For the meaning of 'patient' see PARA 435 ante.

2 As to discharge see PARAS 523-526 post.

3 Ie the period referred to in the Mental Health Act 1983 s 20(1): see PARA 518 ante.

4 Ibid s 20(2)(a). The decision that to renew while the patient was on leave of absence was unlawful in *R v Gardner, ex p L, R v Hallstrom, ex p W* [1986] QB 1090, sub nom *R v Hallstrom, ex p W (No 2)* [1986] 2 All ER 306 (see PARA 506 ante) was overruled by *Barker v Barking, Havering and Brentwood Community Healthcare NHS Trust (Warley Hospital)* [1999] 1 FLR 106, (1998) 47 BMLR 112, CA (see PARA 520 post).

5 Mental Health Act 1983 s 20(2)(b).

UPDATE

519 Renewal of authority for detention or guardianship

NOTES 4, 5--Mental Health Act 1983 s 20(2) amended: Mental Health Act 2007 Sch 3 para 5(a).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(10) DURATION, DISCHARGE (OTHER THAN BY TRIBUNAL) AND RECLASSIFICATION/520. Procedure and criteria for renewal.

520. Procedure and criteria for renewal.

Where a patient¹ is liable to be detained for treatment², it is the duty of the responsible medical officer³, within the period of two months ending on the day on which the patient would cease to be so liable in default of the renewal of the authority for his detention⁴, to examine the patient and, if certain conditions are fulfilled, to furnish a report to the managers⁵. A report⁶ must be furnished if: (1) the patient is suffering from mental illness, severe mental impairment, psychopathic disorder or mental impairment⁷ and his mental disorder is of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital⁸; and (2) such treatment is likely to alleviate or prevent a deterioration of his condition (the 'treatability' test) or, in the case of mental illness or severe mental impairment, the patient if discharged is unlikely to be able to care for himself, to obtain the care which he needs or to guard himself against serious exploitation⁹; and (3) it is necessary for the health or safety of the patient or for the protection of others that he should receive such treatment and it cannot be provided unless he continues to be detained¹⁰. Before furnishing such a report, the responsible medical officer must consult one or more persons who have been professionally concerned with the patient's medical treatment¹¹. These provisions may only be used to renew authority to detain a patient whose condition requires detention as an in-patient¹².

Where the patient is subject to guardianship¹³ it is the duty of the responsible medical officer, if a local social services authority is the guardian, and of the nominated medical attendant¹⁴, in any other case, to examine the patient within the period of two months ending on the day on which the patient would cease to be so subject in default of the renewal of the authority for guardianship¹⁵. If the original grounds for guardianship apply, the medical officer or medical attendant must furnish to the guardian and, if the guardian is a person other than a local social services authority, to the responsible local social services authority¹⁶, a report to that effect in the prescribed form¹⁷.

Where a report is so furnished, the authority for detention or for guardianship, as the case may be, is thereby renewed for the prescribed¹⁸ period¹⁹. On receiving the report, the managers or the local social services authority must, unless they discharge the patient, cause him to be informed of the renewal²⁰, and the patient may within the period for which the authority for detention or guardianship is renewed by virtue of the report apply²¹ to a mental health review tribunal²².

1 For the meaning of 'patient' see PARA 435 ante.

2 I.e. in pursuance of an application for admission for treatment, or in pursuance of a hospital order, admission order or transfer direction without restrictions: see PARA 518 ante. See the Mental Health Act 1983 s 40(4), Sch 1 Pt I paras 2, 6; and PARAS 487-488 ante.

3 For the meaning of 'responsible medical officer' see PARA 506 note 1 ante.

4 The period is varied as regards patients absent without leave: see the Mental Health Act 1983 s 21 (as substituted); and PARA 521 post.

5 Ibid s 20(3). As to the hospital managers see PARA 439 ante. For the prescribed form for such reports see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 10(1), Sch 1 Form 30 (Sch 1 Form 30 substituted by SI 1996/540). Any renewal must be recorded by the managers: Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 10(3).

6 Where the form of mental disorder specified in a report under the Mental Health Act 1983 s 20(3) or (6) is different from that specified in the application, order or direction, then that application, order or direction has effect as if the other form of mental disorder were specified in it; there is no need to furnish a report of reclassification: ss 20(9), 40(4), Sch 1 Pt I paras 2, 6. See also PARAS 487-488 ante.

7 For the meanings of these terms see PARAS 402-403 ante.

8 Mental Health Act 1983 s 20(4)(a). As to the meaning of 'medical treatment' see PARA 552 post. For the meaning of 'hospital' see PARA 417 ante. 'Treatment in hospital' can include monitoring and assessing the patient's condition, and need not be treatment as an in-patient: see *Barker v Barking, Havering and Brentwood Community Healthcare NHS Trust (Warley Hospital)* [1999] 1 FLR 106, (1998) 47 BMLR 112, CA; *R (on the application of DR) v Merseycare NHS Trust* (2002) Times, 11 October, [2002] All ER (D) 28 (Aug).

9 Mental Health Act 1983 s 20(4)(b).

10 Ibid s 20(4)(c). Absence from hospital on leave does not mean that a patient is no longer detained: *Barker v Barking, Havering and Brentwood Community Healthcare NHS Trust (Warley Hospital)* [1999] 1 FLR 106, (1998) 47 BMLR 112, CA. See also *R (on the application of CS) v Mental Health Review Tribunal* [2004] EWHC 2958 (Admin); *R (on the application of Epsom and St Helier NHS Trust) v Mental Health Review Tribunal* [2001] EWHC 101 (Admin), [2001] 1 MHLR 8.

11 Mental Health Act 1983 s 20(5).

12 See *R v Gardner, ex p L, R v Hallstrom, ex p W* [1986] QB 1090, sub nom *R v Hallstrom, ex p W (No 2)* [1986] 2 All ER 306.

A renewal of detention under the Mental Health Act 1983 s 20 is possible if the patient has been granted absence of leave, provided the course of treatment requires an in-patient element: *Barker v Barking, Havering and Brentwood Community Healthcare NHS Trust (Warley Hospital)* [1999] 1 FLR 106, (1998) 47 BMLR 112, CA. In renewing detention, the essential question is whether hospital treatment is a significant element of the proposed treatment plan and not whether it is planned for the patient to be an in-patient: *R (on the application of DR) v Merseycare NHS Trust* (2002) Times, 11 October, [2002] All ER (D) 28 (Aug).

13 Ie under the Mental Health Act 1983 Pt II (ss 2-34) (as amended) (see PARA 469 et seq ante) or under a guardianship order (see PARA 502 ante): see s 40(4), Sch 1 Pt I paras 2, 6; and PARAS 487-488 ante.

14 For the meaning of 'nominated medical attendant' see PARA 476 note 3 ante.

15 Mental Health Act 1983 s 20(6).

16 Ie the local social services authority (see PARA 424 ante) for the area in which the guardian resides: ibid s 34(3)(b).

17 Ibid s 20(6), (7). See PARA 469 ante. For the prescribed form for such reports see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 10(2), Sch 1 Form 31 Pt I. Any renewal must be recorded by the responsible local social services authority: reg 10(3), Sch 1 Form 31 Pt II.

18 Ie the period prescribed by the Mental Health Act 1983 s 20(2): see PARA 519 ante.

19 Ibid s 20(8). The authority is renewed without any action on the part of the managers or the local social services authority, as the case may be; however, there is power to discharge the patient at any time (see s 23 (as amended); and PARA 523 post) and the forms provide space for recording the fact that they have considered the report and their decision whether or not to discharge the patient. There is no common law power to detain once the statutory period has expired: *B v Forsey* 1988 SLT 572, HL.

20 Mental Health Act 1983 s 20(3), (6). The power of the managers to discharge is under s 23(2)(a) (see PARA 523 post) and they must consider the conditions of renewal under s 20(4) in exercising this power: *R (on the application of DR) v Merseycare NHS Trust* (2002) Times, 11 October, [2002] All ER (D) 28 (Aug). Even if they find that conditions for renewal are met, the managers can exercise their discretion under the Mental Health Act 1983 s 23(2) to order discharge: *R v Riverside Mental Health Trust, ex p Huzzey* (1998) 43 BMLR 167.

21 He may apply only once during that period: Mental Health Act 1983 s 77(2). A withdrawn application is to be disregarded: s 77(2).

22 See ibid s 66(1)(f), (1)(i), 2(f) (as amended); and PARA 564 post. As to the circumstances in which an application may be made to a mental health review tribunal where a report has been compiled in respect of the renewal of an order or direction for after-care under supervision (see PARA 528 et seq post) for a patient see s 66(1)(gc) (as added), (i) (as amended), (2)(fa) (as added); and PARA 564 post.

UPDATE

520 Procedure and criteria for renewal

TEXT AND NOTES 5, 11, 20--Mental Health Act 1983 s 20(3), (5), (6) amended, s 20(5A) added: Mental Health Act 2007 s 9(4)(a)-(c).

NOTES 5, 17--Mental Health Act 1983 s 20(3), (6) amended: Mental Health Act 2007 Sch 3 para 5(b). SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

TEXT AND NOTES 6-10--In head (1) for 'mental illness ... degree' read 'mental disorder'; head (2) omitted; and new head (4) that appropriate medical treatment (see PARA 461) is available for him: Mental Health Act 1983 s 20(4) (amended by Mental Health Act 2007 s 4(4), Sch 1 para 4(a), Sch 11 Pt 2).

NOTE 6--Mental Health Act 1983 s 20(9) repealed: Mental Health Act 2007 Sch 11 Pt 1.

NOTE 21--As to the Mental Health Act 1983 s 77(2) see PARA 563.

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521. Effect on duration of absence without leave.

Where a patient¹ is absent without leave on the day on which, apart from this provision, he would otherwise cease to be liable to be detained or subject to guardianship², or within the period of one week ending with that day, he does not cease to be so liable or subject until the relevant time³. The relevant time: (1) where the patient is taken into custody⁴, is the end of the period of one week beginning with the day on which he is returned to the hospital or place where he ought to be⁵; (2) where the patient returns himself to the hospital or place where he ought to be within the period during which he can be taken into custody⁶, is the end of the period of one week beginning with the day on which he so returns himself⁷; and (3) otherwise, is the end of the period during which he can be taken into custody⁸.

Where a patient who is absent without leave is taken into custody⁹, or returns himself to the hospital or place where he ought to be, not later than the end of the period of 28 days beginning with the first day of his absence without leave¹⁰: (a) where the period for which the patient is liable to be detained or subject to guardianship is extended¹¹, any examination and report¹² to be made and furnished in respect of the patient may be made and furnished within the period as so extended¹³; (b) where the authority for the detention or guardianship of the patient is renewed by virtue of head (a) above after the day on which that authority would have expired, the renewal takes effect as from that day¹⁴.

The following applies where a patient who is absent without leave is taken into custody¹⁵, or returns himself to the hospital or place where he ought to be, later than the end of the period of 28 days beginning with the first day of his absence without leave¹⁶. It is the duty of the appropriate medical officer¹⁷, within the period of one week beginning with the day on which the patient is returned or returns himself to the hospital or place where he ought to be, to examine the patient and, if it appears to him that the relevant conditions¹⁸ are satisfied, to furnish to the appropriate body¹⁹ a report to that effect in the prescribed form; and, where such a report is furnished in respect of the patient, the appropriate body must cause him to be informed²⁰. Where the patient is liable to be detained, rather than subject to guardianship, the appropriate medical officer must, before furnishing a report, consult one or more other persons who have been professionally concerned with the patient's medical treatment, and an approved social worker²¹. Where the patient would, apart from any renewal of the authority for his detention or guardianship on or after the day on which he is returned or returns himself to the hospital or place where he ought to be, be liable to be detained or subject to guardianship after the end of the period of one week beginning with that day, he ceases to be so liable or subject at the end of that period unless a report is duly furnished in respect of him²². Where the patient would have ceased to be liable to be detained or subject to guardianship on or before the day on which a report is duly furnished in respect of him, the report must renew the authority for his detention or guardianship for the period prescribed in that case²³. Where the authority for the detention or guardianship of the patient is renewed, the renewal takes effect as from the day on which the authority would have expired, and if the renewed authority would expire on or before the day on which the report is furnished, the report must further renew the authority as from the day on which it would expire, for the period prescribed in that case²⁴.

1 For the meaning of 'patient' see PARA 435 ante.

2 Ie under the Mental Health Act 1983 Pt II (ss 2-34) (as amended).

3 Ibid s 21(1) (s 21 substituted by the Mental Health (Patients in the Community) Act 1995 s 2(2)). See also note 11 infra.

The Mental Health Act 1983 s 21 (as substituted) applies with any necessary modifications to a patient who is at large and liable to be retaken by virtue of s 138 (see PARA 447 ante) as it applies to a patient who is absent without leave within the meaning of s 18 (as amended) (see PARA 507 ante); and references in s 21 (as substituted) to s 18 (as amended) are to be construed accordingly: s 138(6).

4 le under ibid s 18 (as amended) (see PARA 507 ante).

5 Ibid s 21(2)(a) (as substituted: see note 3 supra). For the meaning of 'hospital' see PARA 417 ante.

6 le under ibid s 18 (as amended) (see PARA 507 ante).

7 Ibid s 21(2)(b) (as substituted: see note 3 supra).

8 Ibid s 21(2)(c) (as substituted: see note 3 supra).

9 le under ibid s 18 (as amended) (see PARA 507 ante).

10 Ibid s 21A(1) (ss 21A, 21B added by the Mental Health (Patients in the Community) Act 1995 s 2(2)).

11 le by the Mental Health Act 1983 s 21 (as substituted).

12 le under ibid s 20(3) or (6) (see PARA 520 ante).

13 Ibid s 21A(2) (as added: see note 10 supra).

14 Ibid s 21A(3) (as added: see note 10 supra).

15 le under ibid s 18 (as amended).

16 Ibid s 21B(1) (as added: see note 10 supra).

17 'Appropriate medical officer' has the same meaning as in ibid s 16(5) (see PARA 527 note 7 post): s 21B(10) (as added: see note 10 supra).

18 'Relevant conditions' means, in relation to a patient who is liable to be detained in a hospital, the conditions set out in ibid s 20(4), and, in relation to a patient who is subject to guardianship, the conditions set out in s 20(7): s 21B(10) (as added: see note 10 supra). As to the conditions see PARA 520 ante.

19 'Appropriate body' means, in relation to a patient who is liable to be detained in a hospital, the managers of the hospital, and, in relation to a patient who is subject to guardianship, the responsible local social services authority: ibid s 21B(10) (as added: see note 10 supra). For the meaning of 'managers' see PARA 439 ante.

20 Ibid s 21B(2) (as added: see note 10 supra). As to the prescribed form to be used see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 10A, Sch 1 Forms 31A, 31B (added by SI 1997/801). The receipt of a report must be recorded by the managers of the hospital in which the patient is liable to be detained or, as the case may be, the responsible local social services authority, in the prescribed form: Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 10A, Sch 1 Forms 31A, 31B (as so added).

21 Mental Health Act 1983 s 21B(3) (as added: see note 10 supra). As to the meaning of 'medical treatment' see PARA 552 post. For the meaning of 'approved social worker' see PARA 427 ante.

22 Ibid s 21B(4) (as added: see note 10 supra).

23 Ibid s 21B(5) (as added: see note 10 supra). As to the period prescribed see s 20(2); and PARA 519 ante.

24 Ibid s 21B(6) (as added: see note 10 supra). As to the period prescribed see s 20(2); and PARA 519 ante. Where the authority for the detention or guardianship of the patient would expire within the period of two months beginning on the day on which a report is duly furnished in respect of him under s 21B(2) (as added) (see the text and note 20 supra), the report also, if it so provides, has effect as a report duly furnished under s 20(3) or (6) (see PARA 520 ante): s 21B(7) (as so added). 'Authority' includes any authority renewed under s 21B(5) (as added) (see the text and note 23 supra) by the report: s 21B(7) (as so added). Where the form of mental disorder specified in a report furnished under s 21B(2) (as added) is a form of disorder other than that specified in the application for admission for treatment or the guardianship application concerned, and the report does not have effect as a report furnished under s 20(3) or (6), that application has effect as if that other form of mental disorder were specified in it: s 21B(8) (as so added). Where on any occasion a report specifying

such a form of mental disorder is furnished under s 21B(2) (as added), the appropriate medical officer need not furnish a report under s 16 (see PARA 527 post): s 21B(9) (as so added).

UPDATE

521 Effect on duration of absence without leave

TEXT AND NOTES--As to the application of these provisions to community patients who are absent without leave see Mental Health Act 1983 ss 21, 21A, 21B (amended by Mental Health Act 2007 Sch 3 paras 6(3), (7), (8)).

TEXT AND NOTES 1-8--Mental Health Act 1983 s 21(3) (absence without leave where patient's case to be referred to appropriate tribunal) added by Mental Health Act 2007 s 37(2); and amended by SI 2008/2833.

NOTE 3--Mental Health Act 1983 s 21(1) amended: Mental Health Act 2007 Sch 3 para 6(2).

NOTE 17--Definition repealed: Mental Health Act 2007 s 9(5)(b).

NOTES 20, 21--Mental Health Act 1983 s 21B(2), (3) amended: Mental Health Act 2007 s 9(5)(a).

NOTE 20--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

NOTE 24--Mental Health Act 1983 s 21B(8), (9) repealed: Mental Health Act 2007 Sch 11 Pt 1.

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522. Patients detained in custody by sentence or court order.

Where a patient¹ who is liable to be detained for treatment (in pursuance of an application, order or direction without restrictions) or who is subject to guardianship (by virtue of a guardianship application or order)² is detained in custody in pursuance of any sentence or order passed or made by a court in the United Kingdom³, including an order committing or remanding him in custody, and is so detained for a period exceeding, or for successive periods exceeding in the aggregate, six months, the application ceases to have effect at the end of that period⁴.

Where such a patient is so detained in custody but the application (or order or direction) does not cease to have effect under this provision⁵, then: (1) if he would otherwise have ceased to be liable to detention or subject to guardianship on or before the day on which he is discharged from custody, he does not cease and is deemed not to have ceased to be so liable or subject until the end of that day⁶; and (2) in any case, the provisions relating to the return and readmission of patients absent without leave⁷ and the special provisions as to the duration of detention⁸ apply to him as if he had absented himself without leave on that day⁹.

1 For the meaning of 'patient' see PARA 435 ante.

2 As to applications for admission for treatment and guardianship applications see PARAS 461, 469 ante. In the application of the Mental Health Act 1983 s 22 (as amended) to patients with respect to whom a hospital order without restrictions (see PARA 491 ante), an admission order without restrictions (see PARA 499 ante), a transfer direction without restrictions (see PARAS 535-536 post) or a guardianship order (see PARA 502 ante) has been made, for the references to an application for admission or a guardianship application there are substituted references to the order or direction under Pt III (ss 35-55) (as amended) by virtue of which the patient is liable to be detained or subject to guardianship: see ss 40(4), 47(3), 55(4), Sch 1 Pt I paras 2, 7; and PARAS 487-488 ante.

3 For the meaning of 'United Kingdom' see PARA 406 note 18 ante.

4 Mental Health Act 1983 s 22(1). The provisions of s 22(1), (2)(a) (see the text and note 6 infra) do not apply to patients with respect to whom a hospital order with restrictions (see PARA 496 ante), an order for committal to hospital (see PARA 498 ante), an admission order with restrictions (see PARA 499 ante) or a transfer direction with restrictions (see PARA 537 post) has been made: see s 40(4), s 41(3), s 49(2), 55(4), Sch 1 Pt II paras 2, 6 (s 41(3) as amended); and PARAS 487-488 ante. Section 22 (as amended) is not referred to in s 56 (see PARA 551 post); the consent to treatment provisions of Pt IV (ss 56-64) (as amended) (see PARA 551 et seq post) continue to apply during the period spent in custody.

5 I.e. under *ibid* s 22(1): see the text and note 4 supra.

6 *Ibid* s 22(2)(a). As to the exclusion of this provision in the case of patients subject to restriction on discharge see note 4 supra.

Where, by virtue of s 22(2) (as amended), s 18(4) (as substituted) applies (see PARA 507 ante), it has effect as if it provided that a patient is not to be taken into custody after the end of the period of 28 days beginning with the first day of his absence without leave: see s 22(3) (added by the Mental Health (Patients in the Community) Act 1995 s 2(3)(b)).

7 I.e. the provisions of the Mental Health Act 1983 s 18 (as amended): see PARAS 477, 507 ante).

8 I.e. the provisions of *ibid* s 21 (as substituted), s 21A (as added): see PARA 521 ante.

9 *Ibid* s 22(2)(b) (amended by the Mental Health (Patients in the Community) Act 1995 s 2(3)(a)).

UPDATE

522 Patients detained in custody by sentence or court order

TEXT AND NOTES--Community patients, like those detained for treatment, who are imprisoned for more than six months (or for successive periods exceeding six months in total) are no longer subject to the Mental Health Act 1983 on their release: Mental Health Act 1983 s 22 (substituted by Mental Health Act 2007 Sch 3 para 9).

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523. Orders for discharge other than by a mental health review tribunal.

A patient¹ who is for the time being liable to be detained or subject to guardianship² ceases to be so liable or subject if an order in writing discharging him from detention or guardianship (an 'order for discharge') is duly³ made⁴.

An order for discharge may be made in respect of a patient: (1) where the patient is liable to be detained in a hospital⁵ in pursuance of an application for admission for assessment⁶ or of an application for admission to treatment⁷, by the responsible medical officer⁸ or by the managers⁹ of the hospital or the nearest relative of the patient¹⁰; and (2) where the patient is subject to guardianship¹¹, by the responsible medical officer, by the responsible local social services authority¹² or by the patient's nearest relative¹³.

Where an order for discharge is made otherwise than by virtue of an application made by the nearest relative of the patient to be discharged, the managers of the hospital or registered establishment¹⁴ have a duty to take such steps as are practicable to inform the person, if any, appearing to them to be the patient's nearest relative, at least seven days before the date of discharge¹⁵.

Where the patient is liable to be detained in a registered establishment, an order for his discharge may¹⁶ also be made by the Secretary of State and, if the patient is maintained under a contract with an NHS trust, NHS foundation trust, health authority, special health authority or primary care trust¹⁷, by that trust or authority¹⁸.

1 For the meaning of 'patient' see PARA 435 ante.

2 I.e. under the Mental Health Act 1983 Pt II (ss 2-34) (as amended). Section 23 (as amended) applies with certain modifications to patients subject to hospital or admission orders, directions and guardianship orders: see notes 4, 13 infra.

3 I.e. in accordance with *ibid* s 23 (as amended). An order for discharge granted by a panel constituted under this provision may only be made if a unanimous decision of all three members is made: *R (on the application of Tagoe-Thompson) v Central and North West London Mental Health NHS Trust* [2003] EWCA Civ 330, [2003] 1 WLR 1272. As to discharge by mental review tribunal see PARA 569 et seq post.

4 Mental Health Act 1983 s 23(1). In the application of s 23(1) to patients with respect to whom a hospital order with a restriction order (see PARA 496 ante), an order for committal to hospital (see PARA 498 ante), an admission order with restrictions (see PARA 499 ante), a direction for detention in hospital (see PARA 499 ante) or a transfer direction with restrictions (see PARA 537 post) has been made, references to guardianship must be omitted and the consent of the Secretary of State is required for the making of an order for discharge: see ss 40(4), 41(3), 55(4), Sch 1 Pt II paras 2, 7 (s 41(3) as amended); and PARAS 487-488 ante. See also PARA 496 ante. As to the additional power of the Secretary of State to discharge restricted patients see PARA 524 post. As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

5 For the meaning of 'hospital', which for this purpose includes a registered establishment, see PARA 417 ante.

6 As to admissions for assessment see the Mental Health Act 1983 s 2; and PARA 460 ante.

7 As to applications for admission for treatment see *ibid* s 3; and PARA 461 ante.

8 For the meaning of 'responsible medical officer' see PARA 506 note 1 ante. As to the criteria for a responsible medical officer see *R (on the application of South West London and St George's Mental Health NHS Trust) v W* [2002] All ER (D) 62 (Aug). As to the discretion of the responsible medical officer see *R (on the*

application of C) v Mental Health Review Tribunal for the London South and South West Region [2000] 1 MHLR 220.

9 For the meaning of 'managers' see PARA 439 ante. The powers conferred by the Mental Health Act 1983 s 23 (as amended) on any authority, trust (other than an NHS foundation trust) or body of persons may be exercised (subject to s 23(5) (as amended)) by any three or more members of that authority, trust or body authorised in that behalf or by three or more members of a committee or sub-committee of that authority, trust or body which has been authorised in that behalf: s 23(4) (amended by the National Health Service and Community Care Act 1990 s 66(1), Sch 9 para 24(3)(b); and the Health and Social Care (Community Health and Standards) Act 2003 s 34, Sch 4 paras 50, 53(b)). The reference in the Mental Health Act 1983 s 23(4) (as amended) to the members of an authority, trust or body or the members of a committee or sub-committee of an authority, trust or body: (1) in the case of a health authority, special health authority or primary care trust or a committee or sub-committee of a health authority, special health authority or primary care trust, is a reference only to the chairman of the authority or trust and such members of the authority, trust, committee or sub-committee, as the case may be, as are not also officers of the authority or trust, within the meaning of the National Health Service Act 1977; and (2) in the case of an NHS trust or a committee or sub-committee of such a trust, is a reference only to the chairman of the trust and such directors or (in the case of a committee or sub-committee) members as are not also employees of the trust: Mental Health Act 1983 s 23(5) (added by the National Health Service and Community Care Act 1990 Sch 9 para 24(3)(c); and amended by the Health Authorities Act 1995 s 2(1), Sch 1 para 107(2); and the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 para 16(1), (4)(b)). The powers conferred by the Mental Health Act 1983 s 23 (as amended) on any NHS foundation trust may be exercised by any three or more non-executive directors of the board of the trust authorised by the board in that behalf: s 23(6) (added by the Health and Social Care (Community Health and Standards) Act 2003 Sch 4 paras 50, 53(c)). For the meaning of 'health authority' see PARA 414 note 6 ante. For the meaning of 'special health authority' see PARA 410 note 10 ante. For the meaning of 'primary care trust' see PARA 414 note 6 ante. As to NHS trusts and NHS foundation trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq. See also *R (on the application of Tagoe-Thompson) v Central and North West London Mental Health NHS Trust* [2003] EWCA Civ 330, [2003] 1 WLR 1272; and note 3 supra.

As to guidance to hospital managers on the exercise of their power under the Mental Health Act 1983 s 23 (as amended) see Code of Practice (1999) ch 23. There is no requirement to hold a meeting but in practice one is normally held which must accord with the rules of natural justice, and a patient can apply to the managers as frequently as he wishes. See PARA 520 note 20 ante. As to the Code of Practice see PARA 436 ante.

10 Mental Health Act 1983 s 23(2)(a). For the meaning of 'nearest relative' see PARA 453 ante. For restrictions on discharge by the nearest relative see PARA 525 post. As to the criteria for use by hospital managers when considering the continued detention of a s 3 patient where the application for discharge had been subject to a 'barring report' under s 25 (see PARA 525 post) see *R v Riverside Mental Health Trust, ex p Huzzey* (1998) 43 BMLR 167. See also *R (on the application of SR by her Litigation Friend the Official Solicitor) v Huntercombe Maidenhead Hospital* [2005] All ER (D) 115 (Sep) (under the Mental Health Act 1983 s 23 (as amended) the managers have a wide discretion to discharge a patient but there is no inflexible rule that if the resident medical officer's view as to dangerousness is overruled discharge is inevitable). As to the exercise of the power under the Mental Health Act 1983 s 23(2) see PARA 520 note 20 ante. See also *R (on the application of South West London and St George's Mental Health NHS Trust) v W* [2002] All ER (D) 62 (Aug).

11 As to applications for guardianship see the Mental Health Act 1983 s 7; and PARA 469 et seq ante.

12 For the meaning of 'responsible local social services authority' see PARA 475 note 1 ante. As to the members of the authority who may exercise this power see note 9 supra.

13 Mental Health Act 1983 s 23(2)(b). In the application of s 23(2) to patients with respect to whom a hospital order without restrictions (see PARA 491 ante), an admission order without restrictions (see PARA 499 ante), a transfer direction without restrictions (see PARAS 535-536 post) or a guardianship order (see PARA 502 ante) has been made, the words 'for assessment or' in s 23(2)(a) and the reference in s 23(2)(a), (b) to the nearest relative of the patient must be omitted: ss 40(4), 55(4), Sch 1 Pt I paras 2, 8. In the application of s 23(2) to patients with respect to whom a hospital order with restrictions (see PARA 496 ante), an order for committal to hospital (see PARA 498 ante), an admission order with restrictions (see PARA 499 ante), a direction for detention in hospital (see PARA 499 ante) or a transfer direction with restrictions (see PARA 537 post) has been made, the words 'for assessment or' and the reference to the nearest relative of the patient in s 23(2)(a), and the whole of s 23(2)(b), must be omitted: ss 40(4), 41(4), 44(3), 49(2), 55(4), Sch 1 Pt II paras 2, 7. The Secretary of State may himself discharge a patient who is subject to restrictions: see s 42(2); and PARA 524 post.

14 For the meaning of 'registered establishment' see PARA 421 ante.

15 Mental Health Act 1983 s 133(1) (amended by the Care Standards Act 2000 s 116, Sch 4 para 9(1), (2)). This does not apply where the patient or nearest relative has requested that such information should not be given: Mental Health Act 1983 s 133(2). As to discharge of restricted patients see PARA 524 post.

16 *Ie* without prejudice to *ibid* s 23(2): see the text to notes 5-13 supra.

17 As to such trusts and authorities see note 9 supra.

18 Mental Health Act 1983 s 23(3) (amended by the National Health Service and Community Care Act 1990 Sch 9 para 24(3); the Health Authorities Act 1995 Sch 1 para 107(2); the Care Standards Act 2000 Sch 4 para 9(1), (2); the Health and Social Care (Community Health and Standards) Act 2003 Sch 4 paras 50, 53(a); and the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, Sch 1 para 16(1), (4)(a)). As to the members of the authorities who may exercise this power see note 9 supra.

UPDATE

523 Orders for discharge other than by a mental health review tribunal

TEXT AND NOTES--Community patients may be absolutely discharged from supervised community treatment by the responsible clinician, hospital managers of the responsible hospital or by the nearest relative: Mental Health Act 1983 s 23(1), (1A), (2)(c), (3A) (s 23(1) amended, s 23(1A), (2)(c), (3A) added, by Mental Health Act 2007 Sch 3 para 10).

NOTE 9--Mental Health Act 1983 s 23(4) further amended: SI 2007/961. Mental Health Act 1983 s 23(5) further amended: National Health Service (Consequential Provisions) Act 2006 Sch 1 para 65; SI 2007/961. Mental Health Act 1983 s 23(6) amended: Mental Health Act 2007 s 45(1).

NOTES 10, 13--Mental Health Act 1983 s 23(2) amended: Mental Health Act 2007 s 9(6).

TEXT AND NOTES 14, 15--This duty applies also in relation to a patient who is to be discharged from hospital under the Mental Health Act 1983 s 17A (see PARA 528A), and is the duty of the managers of the responsible hospital in a case where a community patient is discharged under s 23 or 72 (otherwise than by virtue of an order for discharge made by his nearest relative): s 133(1A), (1B) (added by Mental Health Act 2007 Sch 3 para 31).

NOTE 18--Mental Health Act 1983 s 23(3) further amended: SI 2007/961.

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524. Discharge of restricted patients by Secretary of State.

At any time while a restriction order¹ (or an order or direction having the same effect²) is in force in respect of a patient³, the Secretary of State⁴ may, if he thinks fit, discharge the patient either absolutely or subject to conditions⁵. Where a person is absolutely discharged in this manner he then ceases to be liable to be detained by virtue of the relevant hospital order (or direction) and the restriction order (or direction) ceases to have effect accordingly⁶.

Where a patient has been conditionally discharged in this manner, the Secretary of State may, at any time during the continuance in force of a restriction order, by warrant recall the patient to such hospital⁷ as may be specified in the warrant⁸; and then: (1) if the hospital so specified is not the hospital from which the patient was conditionally discharged, the hospital order and restriction order have effect as if the hospital specified in the warrant were substituted for the hospital specified in the hospital order⁹; and (2) in any case, the patient must be treated¹⁰ as if he had absented himself without leave from the hospital specified in the warrant, and if the restriction order was made for a specified period that period does not in any event expire until the patient returns or is returned¹¹ to the hospital¹².

If a restriction order ceases to have effect after the patient has been conditionally discharged¹³ the patient is, unless previously recalled to hospital, deemed to be absolutely discharged on the date when the order ceases to have effect, and ceases to be liable to be detained under the relevant hospital order accordingly¹⁴.

1 As to restriction orders see PARA 496 ante.

2 For the meaning of 'patient' see PARA 435 ante.

3 Eg a direction for detention in hospital (see PARA 499 ante), or a transfer direction with restrictions (see PARAS 535-537 post). Patients admitted under admission orders with restriction directions are treated as if admitted under a hospital order and a restriction order: see PARA 499 ante.

A restriction order cannot cease to have effect by inference or implication, eg by merely allowing the conditions under which the patient was discharged to lapse: *R v Secretary of State for the Home Department, ex p Didlick* (1993) 16 BMLR 71.

4 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante. His consent is necessary to any discharge of the patient by the responsible medical officer or the hospital managers: see PARA 523 ante. As to his other functions in relation to restricted patients see PARAS 496, 501 ante.

5 Mental Health Act 1983 s 42(2). The Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 8 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 149 et seq) applies to conditions imposed on a patient discharged under the Mental Health Act 1983 s 42(2): see *R (on the application of Craven) v Secretary of State for the Home Department* [2001] EWHC 850 (Admin), [2001] All ER (D) 74 (Oct). A conditionally discharged patient can be detained under the Mental Health Act 1983 s 2, 3 (see PARA 460 et seq ante): see *R v North West London Mental Health NHS Trust* [1997] 4 All ER 871.

A condition requiring a patient to remain in hospital is inconsistent with the duty to discharge conditionally: *Secretary of State for the Home Department v Mental Health Review Tribunal for the Mersey Regional Health Authority, Secretary of State for the Home Department v Mental Health Review Tribunal for Wales* [1986] 3 All ER 233, [1986] 1 WLR 1170. However, see *R (on the application of the Secretary of State for the Home Department) v Mental Health Review Tribunal* [2004] EWHC 2194 (Admin); and PARA 570 post. See also *R (on the application of G) v Mental Health Review Tribunal* [2004] EWHC 2193 (Admin), [2004] All ER (D) 86 (Oct), where the degree and intensity of the restrictions imposed by the conditions was considered; followed in *R (on*

the application of the Secretary of State for the Home Department v Mental Health Review Tribunal [2004] EWHC 2194 (Admin), [2004] All ER (D) 87 (Oct).

A patient who is conditionally discharged under the Mental Health Act 1983 s 42(2) or ss 72-73 (as amended) (see PARAS 570-571 post) is not subject to the consent to treatment provisions in Pt IV (ss 56-64) (as amended): see s 56(1); and PARA 551 post. See also PARA 668 note 8 post.

6 Ibid s 42(2).

7 For the meaning of 'hospital' see PARA 417 ante. Recall may be to a hospital in which ibid s 3 (see PARA 461 ante) is implemented: see *Dlodlo v Mental Health Review Tribunal for the South Thames Region* (1996) 36 BMLR 145, CA. A patient recalled to hospital must have his case referred to a mental health review tribunal within one month: see the Mental Health Act 1983 s 75(1)(a); and PARA 568 post. Judicial review would not be an appropriate challenge to such recalls: see *R (on the application of Biggs) v Secretary of State for the Home Department* [2002] EWHC 1012 (Admin), [2002] All ER (D) 292 (May). As to recall and reclassification see *R (on the application of AL) v Secretary of State for the Home Department* [2005] EWCA Civ 02, [2005] All ER (D) 142 (Jan); and note 8 infra.

8 The Secretary of State may issue such a warrant without medical evidence that the person in respect of whom the restriction order is in force is suffering from mental disorder: *R v Secretary of State for the Home Department, ex p K* [1991] 1 QB 270, [1990] 3 All ER 562, CA. See also *R (on the application of Von Brandenburg (aka Hanley)) v East London and the City Mental Health NHS Trust* [2003] UKHL 58, [2004] 2 AC 280, [2004] 1 All ER 400.

Except in emergency cases, the exercise of this power of recall is a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 5: *Winterwerp v Netherlands* (1981) 4 EHRR 228, ECtHR; and see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 127 et seq.

The exercise of the power under the Mental Health Act 1983 s 42(3) (see PARA 501 ante) where there has been a special verdict finding by a jury (see PARA 499 ante) is not limited to the same form of mental disorder as founded the original detention in hospital: see *R (on the application of AL) v Secretary of State for the Home Department* [2005] EWCA Civ 02, [2005] All ER (D) 142 (Jan).

9 Mental Health Act 1983 s 42(4)(a).

10 Ie for the purposes of ibid s 18 (as amended): see PARA 507 ante.

11 Ie under ibid s 18 (as amended): see PARA 507 ante.

12 Ibid s 42(4)(b).

13 Eg because the restrictions are lifted by the Secretary of State under ibid s 42(1) (see PARA 501 ante), or because the order was of limited duration under s 41(1) and the period of its duration has expired (see PARA 496 ante), or under s 50(2) (as substituted) at the expiration of the sentence of a transferred prisoner (see PARA 538 post).

14 Ibid s 42(5).

UPDATE

524 Discharge of restricted patients by Secretary of State

NOTE 8--Recall is only justified where there has been a change in circumstances since discharge: *R (on the application of T) v Secretary of State for Justice* [2008] EWHC 1707 (Admin), [2008] All ER (D) 259 (Jul).

TEXT AND NOTE 12--Mental Health Act 1983 s 42(4)(b) amended: Mental Health Act 2007 s 40(2), Sch 11 Pt 8.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(10) DURATION, DISCHARGE (OTHER THAN BY TRIBUNAL) AND RECLASSIFICATION/525. Restrictions on discharge by nearest relative.

525. Restrictions on discharge by nearest relative.

An order for the discharge¹ of a patient² who is liable to be detained in a hospital³ may not be made by his nearest relative⁴, except after giving not less than 72 hours' notice in writing to the managers⁵ of the hospital⁶. If, within 72 hours after such notice has been given, the responsible medical officer⁷ furnishes to the managers a report⁸ certifying that in that officer's opinion the patient, if discharged, would be likely to act in a manner dangerous to other persons or to himself, any order made by the nearest relative in pursuance of the notice is of no effect⁹; and no further order may be made by that relative during the period of six months beginning with the date of the report¹⁰.

Where such a report is furnished by the responsible medical officer, it is the duty of the managers to cause the patient's nearest relative to be informed¹¹, and the relevant application may be made to a mental health review tribunal in respect of the patient¹².

1 As to orders for discharge generally see PARA 523 ante. The nearest relative has no power to order the discharge of patients subject to hospital or guardianship orders or orders or directions having the same effect. As to hospital and guardianship orders see PARA 486 et seq ante.

2 For the meaning of 'patient' see PARA 435 ante.

3 For the meaning of 'hospital' see PARA 417 ante. The restrictions in the Mental Health Act 1983 s 25 do not apply to the discharge of patients subject to guardianship applications.

4 For the meaning of 'nearest relative' see PARA 453 ante.

5 For the meaning of 'managers' see PARA 439 ante.

6 Mental Health Act 1983 s 25(1); Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 15(1), (2), Sch 1 Forms 34, 35. The effect of this requirement is to prevent the nearest relative from discharging a patient admitted for assessment in an emergency under the Mental Health Act 1983 s 4 (see PARA 462 ante) unless the period is extended beyond the initial 72 hours by the giving of a second medical recommendation under s 4(4) (see PARA 462 ante). See *Kinsey v North Mersey Community NHS Trust* (21 June 1999, unreported). As to after-care under supervision see PARA 528 et seq post. As to the managers' criteria see *R v Riverside Mental Health Trust, ex p Huzzey* (1998) 43 BMLR 167; *R (on the application of SR by her Litigation Friend the Official Solicitor) v Huntercombe Maidenhead Hospital* [2005] All ER (D) 115 (Sep); and PARA 523 ante. See also the Code of Practice (1999) PARA 23.8(b). As to the Code of Practice see PARA 436 ante.

7 For the meaning of 'responsible medical officer' see PARA 506 note 1 ante.

8 See the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 15(3), Sch 1 Form 36.

9 Mental Health Act 1983 s 25(1)(a). If the hospital managers are not persuaded by the report, the nearest relative is entitled to an order for discharge: *R v Riverside Mental Health Trust, ex p Huzzey* (1998) 43 BMLR 167. See also *R (on the application of SR by her Litigation Friend the Official Solicitor) v Huntercombe Maidenhead Hospital* [2005] All ER (D) 115 (Sep).

10 Mental Health Act 1983 s 25(1)(b). The furnishing of such a report by the responsible medical officer does not prevent the managers themselves from discharging the patient at any time if they think fit.

11 Ibid s 25(2). The obligation to inform the nearest relative applies only in the case of a patient detained in pursuance of an application for admission for treatment.

12 See *ibid* s 66(1)(g), (ga)-(gc) (as added), (i) (as amended), (ii), (2)(a), (d) (as amended), (fa) (as added); and PARA 564 post.

UPDATE

525 Restrictions on discharge by nearest relative

TEXT AND NOTES--The restrictions also apply to community patients: Mental Health Act 1983 s 25(1), (1A), (2) (s 25(1), (2) amended, s 25(1A) added, by Mental Health Act 2007 Sch 3 para 12).

NOTES 6, 8--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

TEXT AND NOTE 7--Reference to the responsible medical officer now to the responsible clinician: Mental Health Act 1983 s 25(1) (amended by Mental Health Act 2007 s 9(8)).

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526. Visiting and examination of patients with a view to discharge.

For the purpose of advising as to the exercise by the nearest relative¹ of a patient² who is liable to be detained or subject to guardianship³ of any power to order his discharge⁴, any registered medical practitioner⁵ authorised by or on behalf of the nearest relative may, at any reasonable time, visit the patient and examine him in private⁶ and require the production of and inspect any records relating to the detention or treatment of the patient in any hospital⁷ or to any after-care services provided for the patient⁸.

Where application is made by the Secretary of State⁹ or a health authority, special health authority, primary care trust, NHS trust or NHS foundation trust¹⁰ to exercise, in respect of a patient liable to be detained in a registered establishment¹¹, any power to make an order for discharge, any registered medical practitioner authorised by the Secretary of State or by that authority or trust, and any other person, whether a registered medical practitioner or not, authorised under the Care Standards Act 2000¹² to inspect the establishment, may at any reasonable time visit the patient and interview him in private¹³. Any person so authorised to visit a patient may require the production of and inspect any documents constituting or alleged to constitute the authority for the detention of the patient¹⁴; and, if he is a medical practitioner, he may also examine the patient in private, and may require the production of and inspect any other medical records relating to the patient's treatment in the establishment or to any after-care services provided for the patient¹⁵.

1 For the meaning of 'nearest relative' see PARA 453 ante.

2 For the meaning of 'patient' see PARA 435 ante.

3 Ie under the Mental Health Act 1983 Pt II (ss 2-34) (as amended). For the application of this provision to persons liable to be detained or subject to guardianship by virtue of an order or direction under Pt III (ss 35-55) (as amended) see PARA 487 ante.

4 As to such powers see PARAS 523, 525 ante. The nearest relative has no power to order the discharge of a patient liable to be detained or subject to guardianship under the Mental Health Act 1983 Pt III (as amended).

5 For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.

6 Mental Health Act 1983 s 24(1). Obstruction of a medical practitioner authorised to visit and examine a patient under s 24 (as amended) would, if established, constitute an offence under s 129 (as amended; prospectively amended): see PARA 772 post. For equivalent provision as to visits and examination for the purposes of applying to a mental health review tribunal see s 76 (as amended); and PARA 566 post. As to the power to visit a patient in hospital for purposes connected with legal proceedings see *Re Petition for Judicial Separation, ex p Beecham* [1901] P 65.

7 For the meaning of 'hospital' see PARA 417 ante.

8 Mental Health Act 1983 s 24(2) (amended by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 1). Such after-care services are provided under the Mental Health Act 1983 s 117 (as amended): see PARAS 425, 428 ante. See also PARA 528 et seq ante.

9 The Secretary of State has a power of discharge under *ibid* s 23(3) (as amended): see PARA 523 ante. As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

10 For the meaning of 'health authority' see PARA 414 note 6 ante. For the meaning of 'special health authority' see PARA 410 note 10 ante. For the meaning of 'primary care trust' see PARA 414 note 6 ante. As to NHS trusts and NHS foundation trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq. Such an authority or

trust has a power of discharge in respect of a patient maintained under a contract between the authority or trust and the relevant registered establishment: see *ibid* s 23(3) (as amended); and PARA 523 ante. See also note 11 *infra*.

11 For the meaning of 'registered establishment' see PARA 421 ante.

12 *Ie* under the Care Standards Act 2000 Pt II (ss 11-42) (as amended; prospectively amended).

13 Mental Health Act 1983 s 24(3) (amended by the Health Authorities Act 1995 s 2(1), Sch 1 para 107(3); the Care Standards Act 2000 s 116, Sch 4 para 9; the Health and Social Care (Community Health and Standards) Act 2003 s 34, Sch 4 paras 50, 54; and the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 para 16(1), (5)). As to the application of this provision to patients liable to be detained under the Mental Health Act 1983 Pt III (as amended) see note 15 *infra*.

14 *Ie* under *ibid* Pt II (as amended).

15 *Ibid* s 24(4) (amended by the Mental Health (Patients in the Community) Act 1995 Sch 1 para 1). Such services are provided under the Mental Health Act 1983 s 117 (as amended): see PARAS 425, 428 ante, 528 et seq post. The provisions of s 24(3), (4) (as amended) apply to patients liable to be detained under Pt III (as amended) (patients concerned in criminal proceedings or under sentence) without modification: see ss 40(4), 41(3), (5), 55(4), Sch 1 Pt I para 1, Pt II para 1 (as amended); and PARAS 487-488 ante.

UPDATE

526 Visiting and examination of patients with a view to discharge

TEXT AND NOTES--References are now to a registered medical practitioner or approved clinician and these provisions also apply to advising a nearest relative about making an order for the discharge of a community patient: Mental Health Act 1983 s 24 (amended by Mental Health Act 2007 s 9(7), Sch 3 para 11).

TEXT AND NOTE 10--For 'health authority' read 'local health board': Mental Health Act 1983 s 24(3) (amended by SI 2007/961). 'Local health board' means a local health board established under the National Health Services (Wales) Act 2006: 1983 Act s 145(1) (definition added by SI 2007/961).

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527. Reclassification of patients.

If, in the case of a patient¹ who is for the time being detained in a hospital² in pursuance of an application for admission for treatment³ or of a hospital or admission order without restrictions or a transfer direction without restrictions⁴, or who is subject to guardianship in pursuance of a guardianship application⁵ or a guardianship order⁶, it appears to the appropriate medical officer⁷ that the patient is suffering from a form of mental disorder⁸ other than the form or forms specified in the application, order or direction, he may furnish to the managers⁹ of the hospital, or to the guardian, as the case may be, a report to that effect¹⁰. Before doing so, he must consult one or more persons who have been professionally concerned with the patient's treatment¹¹. Where a report is so furnished, the application, order or direction has effect as if that other form of mental disorder were specified in it¹². However, if the report is to the effect that the patient is suffering from psychopathic disorder or mental impairment, but not mental illness or severe mental impairment, the medical officer must also state whether in his opinion further medical treatment in hospital is likely to alleviate or prevent a deterioration of the patient's condition (the 'treatability' requirement)¹³. If his opinion is that it is not, the managers' authority to detain the patient ceases¹⁴.

Where such a report is furnished, the managers or guardian must cause the patient and the nearest relative to be informed¹⁵, and the patient or relative may, within a period of 28 days beginning with the day on which he is so informed, apply to a mental health review tribunal¹⁶, which has the power to reclassify the patient in respect of whom the application is made¹⁷.

1 For the meaning of 'patient' see PARA 435 ante.

2 For the meaning of 'hospital' see PARA 417 ante.

3 As to applications for admission for treatment see PARA 461 ante.

4 As to hospital orders see PARA 491 ante; as to admission orders see PARA 499 ante; and as to transfer directions see PARAS 535-536 post. The Mental Health Act 1983 s 16 is applied to patients detained pursuant to such orders and directions by ss 40(4), 55(4), Sch 1 Pt I paras 2, 3. However, s 16 does not apply in relation to hospital orders with restrictions (see PARA 496 ante), orders of magistrates' courts committing offenders to hospital instead of committing them in custody (see PARA 498 ante), admission orders with restrictions (see PARA 499 ante), directions for the removal to hospital of persons who have been ordered to be kept in custody (see PARA 499 ante) and transfer directions with restrictions (see PARA 537 post): see ss 40(4), 41(3), 55(4), Sch 1 Pt II (as amended); and PARAS 487-488 ante.

5 As to guardianship applications see PARA 469 et seq ante.

6 As to guardianship orders see PARAS 502-503 ante. The Mental Health Act 1983 s 16 is applied to patients subject to guardianship orders: see note 4 supra.

7 In relation to a patient who is subject to the guardianship of a person other than a local social services authority (see PARA 424 ante), 'appropriate medical officer' means the nominated medical attendant (see PARA 476 note 3 ante) of the patient; in any other case, it means the responsible medical officer: *ibid* s 16(5). For the meaning of 'responsible medical officer' see PARA 506 note 1 ante.

8 This refers to the four forms of mental disorder in respect of which such admission or guardianship is possible, namely mental illness, severe mental impairment, mental impairment or psychopathic disorder. For the meanings of these terms see PARAS 402-403 ante.

9 For the meaning of 'managers' see PARA 439 ante.

10 Mental Health Act 1983 s 16(1). For forms for reclassification see the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 6, Sch 1 Forms 22, 23 (Sch 1 Form 22 substituted by SI 1996/540).

See *R (on the application of B) v Ashworth Hospital Authority* [2005] UKHL 20, [2005] 2 All ER 289; *R (on the application of B) v Haddock* [2005] EWHC 921 (Admin), [2005] All ER (D) 309 (May); and PARA 553 post.

11 Mental Health Act 1983 s 16(3).

12 Ibid s 16(1).

13 Ibid s 16(2). As to the meaning of 'medical treatment' see PARA 552 post. As to the treatability requirement in the grounds for admission to hospital for treatment see PARA 461 ante; as to making a hospital order see PARA 491 ante; and as to renewing the authority to detain see PARA 520 ante.

14 Ibid s 16(2).

15 Ibid s 16(4).

16 See ibid s 66(1)(d) (as amended), (gb) (as added), (i) (as amended), (2)(d) (as amended); and PARA 564 post. This includes patients subject to after-care under supervision: see PARA 528 et seq post. If a doctor disagrees with the decision of the mental health review tribunal his only remedy is that of judicial review: *R v Pathfinder NHS Trust, ex p W* [1999] 1 MHLR 142.

17 See the Mental Health Act 1983 s 72(5) (as amended); and PARA 574 post.

UPDATE

527 Reclassification of patients

TEXT AND NOTES--Repealed: Mental Health Act 2007 Sch 11 Pt 1.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(11) AFTER-CARE UNDER SUPERVISION/528. Supervision application.

(11) AFTER-CARE UNDER SUPERVISION

528. Supervision application.

Where a patient¹ is liable to be detained in a hospital by virtue of an order or direction for his admission or removal to hospital² and has attained the age of 16 years, an application may be made for him to be supervised after he leaves hospital, for the period allowed³, with a view to securing that he receives the after-care services provided for him⁴. Such an application (a 'supervision application') may be made in respect of a patient only on the grounds that:

- 28 (1) he is suffering from mental disorder, being mental illness, severe mental impairment, psychopathic disorder or mental impairment⁵;
- 29 (2) there will be a substantial risk of serious harm to the health or safety of the patient or the safety of other persons, or of the patient being seriously exploited, if he were not to receive the after-care services to be provided for him after he leaves hospital⁶; and
- 30 (3) his being subject to after-care under supervision is likely to help to secure that he receives the after-care services to be so provided⁷.

A supervision application may be made only by the responsible medical officer⁸. A supervision application in respect of a patient must be addressed to the primary care trust or health authority⁹ which will have the duty¹⁰ to provide after-care services for the patient after he leaves hospital¹¹. Before accepting a supervision application in respect of a patient, a primary care trust or health authority must consult the local social services authority which will also have that duty¹². Where a primary care trust or health authority accepts a supervision application in respect of a patient, it must¹³: (a) inform the patient both orally and in writing that the supervision application has been accepted and of the effect in his case of the provisions relating to a patient subject to after-care under supervision¹⁴; (b) inform certain persons whose names are stated in the supervision application that the application has been accepted¹⁵.

1 For the meaning of 'patient' see PARA 435 ante.

2 Ie under the Mental Health Act 1983 Pt III (ss 35-55) (as amended); see PARA 486 ante. For the meaning of 'hospital' see PARA 417 ante.

3 Ie by the Mental Health Act 1983.

4 Ibid s 25A(1) (s 25A added by the Mental Health (Patients in the Community) Act 1995 s 1(1)). The Mental Health Act 1983 s 25A (as added and amended) applies with modification to certain patients admitted to hospital or placed under guardianship under Pt III (as amended): see ss 40(4), 41(5), 47(3), 48(3), 55(4), Sch 1 para 2 (as amended), Sch 1 para 8A (as added); and PARAS 487-488 ante. Section s 25A(1) (as added) is modified so as to refer to an order or direction for admission or removal to hospital under Pt III (as amended) instead of to an application for admission for treatment. In relation to other patients under Pt III (as amended), s 25A (as added and amended) is excluded by s 41(3)(aa) (as added): see PARAS 487-488 ante.

An application for a patient to be supervised is a 'supervision application': s 25A(2) (as so added); s 145(1) (definition added by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 20(2)). See also note 11 infra. Where a supervision application has been duly made and accepted under Pt II (ss 2-34) (as amended) in respect of a patient and he has left hospital, he is, for the purposes of the Mental Health Act 1983, 'subject to after-care under supervision' until he ceases to be so subject in accordance with the provisions of the

Act: s 25A(2) (as so added). A supervision application must be made in accordance with s 25A-25C (as added) (see the text notes 5-17 *infra*; and PARA 529 post): s 25A(3) (as so added). As to the prescribed form to be used in making a supervision application see the Mental Health (After-care under Supervision) Regulations 1996, SI 1996/294, reg 3(a), Sch 2 Form 1S (amended by SI 2002/2469). As to after-care services see the Mental Health Act 1983 s 117 (as amended); and PARAS 414, 428 ante. See also the guidance issued by the Department of Health and Welsh Office: *Guidance on supervised discharge (after-care under supervision) and related supervisions: Supplement to the Mental Health Act 1983 Code of Practice* (London, 1996) (HSG(96)11).

In relation to care in the community, references in the Mental Health Act 1983 to a patient being subject to after-care under supervision, or to after-care under supervision, must be construed in accordance with the provisions relating to supervision applications: s 145(1A) (added by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 20).

5 Mental Health Act 1983 s 25A(4)(a) (as added: see note 4 *supra*). For the meanings of these terms see PARAS 402-403 ante.

6 *Ibid* s 25A(4)(b) (as added: see note 4 *supra*).

7 *Ibid* s 25A(4)(c) (as added: see note 4 *supra*).

8 *Ibid* s 25A(5) (as added: see note 4 *supra*). For the meaning of 'responsible medical officer' see PARA 506 note 1 ante.

9 For the meanings of 'primary care trust' and 'health authority' see PARA 414 note 6 ante. As to the delegation of the functions by the primary care trust or health authority see the Mental Health (After-care under Supervision) Regulations 1996, SI 1996/294, reg 2 (amended by SI 2002/2469).

10 *Ie* under the Mental Health Act 1983 s 117 (as amended) (see PARA 414 ante).

11 *Ibid* s 25A(6) (as added (see note 4 *supra*); and amended by the National Health Service Reform and Health Care Professions Act 2002 s 2(5), Sch 2 Pt 2 paras 42, 43).

As to the application to relevant patients of the provisions relating to after-care under supervision see the Mental Health Act 1983 s 25J(2) (s 25J added by the Mental Health (Patients in the Community) Act 1995 s 1(1); and amended by the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 16, Sch 3); and the Mental Health (Patients in the Community) (Transfers from Scotland) Regulations 1996, SI 1996/295. The Mental Health Act 1983 s 25J (as added and amended) applies without modification to certain patients admitted to hospital or placed under guardianship under Pt III (as amended): see ss 40(4), 41(5), 47(3), 48(3), 55(4), Sch 1 Pt I para 1; and PARAS 487-488 ante. In relation to other patients under Pt III (as amended), s 25J (as added and amended) is excluded by s 41(3)(aa) (as added): see PARAS 487-488 ante.

12 *Ibid* s 25A(7) (as added (see note 4 *supra*); and amended by the National Health Service Reform and Health Care Professions Act 2002 Sch 2 Pt 2 paras 42, 43).

13 Mental Health Act 1983 s 25A(8) (as added (see note 4 *supra*); and amended by the National Health Service Reform and Health Care Professions Act 2002 Sch 2 Pt 2 paras 42, 43).

14 Mental Health Act 1983 s 25A(8)(a) (as added: see note 4 *supra*). In particular, the patient must also be informed of what rights are available for applying to a mental health review tribunal: s 25A(8)(a) (as so added). As to mental health review tribunals see PARA 560 *et seq* post.

15 See *ibid* s 25A(8)(b), (c) (as added: see note 4 *supra*). Any person whose name is stated in the supervision application in accordance with s 25B(5)(e)(i) (as added) (see PARA 529 post) must be informed that the application has been accepted; and any person whose name is stated in the application in accordance with s 25B(5)(e)(ii) (as added) (see PARA 529 post) must be informed in writing that the supervision application has been accepted: see s 25A(8)(b), (c) (as so added).

Where a person in respect of whom a supervision application is made is granted leave of absence from hospital under s 17 (as amended) (see PARA 506 ante), whether before or after the supervision application is made, references in ss 25A-34 (as added and amended) and Pt V (ss 65-79) (as amended) to his leaving hospital are to be construed as references to his period of leave expiring, otherwise than on his return to the hospital or transfer to another hospital: s 25A(9) (as so added).

UPDATE

528-534 After-care under Supervision

Replaced. Mental Health Act 1983 ss 25A-25J replaced by ss 17A-17G: see PARA 528A.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(11) AFTER-CARE UNDER SUPERVISION/528A. Supervised community treatment.

528A. Supervised community treatment.

The responsible clinician (see PARA 506) may make a community treatment order for a patient detained under the Mental Health Act 1983 s 3 (see PARA 461), or for a patient who is not subject to restrictions under Pt 3 (ss 35-55) (see PARAS 486-505), so as to allow the patient to be discharged from hospital and to live in the community, if the responsible clinician is satisfied that the relevant criteria under s 17A(5) are met, subject to the patient being liable to recall to hospital in accordance with s 17E: s 17A (ss 17A-17G added by Mental Health Act 2007 s 32(2)). A patient in respect of whom a community treatment order is made is referred to as a 'community patient': Mental Health Act 1983 s 17A(7). A community treatment order must specify conditions to which the patient is to be subject; and those conditions must include conditions that the patient must be available for medical examinations, as required for the purposes of determining whether the community treatment order should be extended (see ss 20A, 20B (added by Mental Health Act 2007 s 32(3))), and to allow the second opinion appointed doctor to make a certificate under the Mental Health Act 1983 Pt 4A: s 17B.

A community treatment order ends either if the period of the order runs out and is not extended, or the patient is discharged from the powers of the Mental Health Act 1983, or if the responsible clinician revokes the order following the patient's recall to hospital under s 17F: s 17C. The application for admission for treatment in respect of a patient does not cease to have effect by virtue of his becoming a community patient, but while he remains a community patient, the hospital managers' authority to detain the patient under s 6(2) (see PARA 464) is suspended, and any references under the Mental Health Act 1983 to patients liable to be detained, or detained, do not include community patients: s 17D.

The responsible clinician may recall a community patient to hospital if, in his opinion, the patient requires medical treatment in hospital for his mental disorder and there would be a risk of harm to the health or safety of the patient or to other persons if the patient were not recalled to hospital for that purpose: Mental Health Act 1983 s 17E. As to treatment on recall of a community patient, see s 62A. Where a community patient who is detained in a hospital by virtue of a notice recalling him there under s 17E, the responsible clinician may, subject to an approved mental health professional's agreement that it is appropriate, revoke the patient's community treatment order: s 17F. As to treatment of a community patient following the revocation of a community treatment order, see s 62A. When a community treatment order is revoked, so that the patient is no longer a community patient, the authority to detain the patient under s 6(2) applies as if the patient had never been a community patient, and, in addition, the provisions of the Mental Health Act 1983 apply to the patient as they did when the patient was first admitted to hospital for treatment before the community treatment order was made: s 17G.

As to the authority to treat community patients who are not recalled to hospital under s 17E see Pt 4A (ss 64A-64K) (added by Mental Health Act 2007 s 35(1)).

UPDATE

528-534 After-care under Supervision

Replaced. Mental Health Act 1983 ss 25A-25J replaced by ss 17A-17G: see PARA 528A.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(11) AFTER-CARE UNDER SUPERVISION/529. Circumstances in which supervision application may be made and matters to be included in application.

529. Circumstances in which supervision application may be made and matters to be included in application.

The responsible medical officer¹ must not make a supervision application² unless he has complied with certain requirements³ and has considered specified⁴ matters⁵. The requirements are that:

- 31 (1) the following persons have been consulted about the making of the supervision application, namely the patient⁶, one or more persons who have been professionally concerned with the patient's medical treatment⁷ in hospital⁸, one or more persons who will be professionally concerned with the after-care services to be provided for the patient⁹, and any person who the responsible medical officer believes will play a substantial part in the care of the patient after he leaves hospital but will not be professionally concerned with any of the after-care services to be so provided¹⁰;
- 32 (2) such steps as are practicable have been taken to consult the person, if any, appearing to be the nearest relative¹¹ of the patient about the making of the supervision application¹²; and
- 33 (3) the responsible medical officer has taken into account any views expressed by the persons consulted¹³.

The matters to be considered by the responsible medical officer are the after-care services to be provided for the patient, and any requirements to be imposed on him¹⁴ to secure receipt of after-care under supervision¹⁵.

The supervision application must state:

- 34 (a) that the patient is liable to be detained in a hospital by virtue of an order or direction for his admission or removal to hospital¹⁶;
- 35 (b) the age of the patient, or, if his exact age is not known to the applicant, that the patient is believed to have attained the age of 16 years¹⁷;
- 36 (c) that in the opinion of the applicant, having regard to the patient's history, certain conditions¹⁸ are complied with¹⁹;
- 37 (d) the name of the person who is to be the community responsible medical officer²⁰ and of the person who is to be the supervisor in relation to the patient after he leaves hospital²¹; and
- 38 (e) the name of any person who has been consulted by the responsible medical officer and whom it is believed will play a substantial part in the care of the patient after he leaves hospital but will not be professionally concerned with any of the after-care services to be provided²²; and the name of the person who has been consulted by the responsible medical officer because he appears to be the nearest relative of the patient²³.

A supervision application must be accompanied by the written recommendation²⁴ of a registered medical practitioner²⁵ who will be professionally concerned with the patient's medical treatment after he leaves hospital or, if no such practitioner other than the responsible medical

officer will be so concerned, of any registered medical practitioner²⁶. The application must also include the written recommendation²⁷ of an approved social worker²⁸.

A supervision application must also be accompanied by:

- 39 (i) a statement in writing by the person who is to be the community responsible medical officer in relation to the patient after he leaves hospital that he is to be in charge of the medical treatment provided for the patient as part of the after-care services provided for him²⁹;
- 40 (ii) a statement in writing by the person who is to be the supervisor³⁰ in relation to the patient after he leaves hospital that he is to supervise the patient with a view to securing that he receives the after-care services so provided³¹;
- 41 (iii) details of any after-care services to be provided for the patient³²;
- 42 (iv) details of any requirements to be imposed on him³³ to secure receipt of after-care under supervision³⁴.

On making a supervision application in respect of a patient, the responsible medical officer must inform:

- 43 (A) the patient, both orally and in writing³⁵;
- 44 (B) any person consulted by the responsible medical officer whom it is believed will play a substantial part in the care of the patient after he leaves hospital but will not be professionally concerned with any of the after-care services to be so provided³⁶; and
- 45 (C) in writing, any person who has been consulted by the responsible medical officer because he appears to be the nearest relative of the patient³⁷, of the following matters, namely that the application is being made, of the after-care services to be provided for the patient, of any requirements to be imposed on him regarding secure receipt of after-care under supervision, and the name of the person who is to be the community responsible medical officer, and of the person who is to be the supervisor, in relation to the patient after he leaves hospital³⁸.

A supervision application and the recommendation³⁹ accompanying it may describe the patient as suffering from more than one of the following forms of mental disorder, namely mental illness, severe mental impairment, psychopathic disorder and mental impairment⁴⁰. A supervision application is of no effect unless the patient is described in the application and the recommendation accompanying it as suffering from the same form of mental disorder, whether or not he is also described in the application or the recommendation as suffering from another form⁴¹. A registered medical practitioner may at any reasonable time visit a patient and examine him in private for the purpose of deciding whether to make a recommendation⁴². An approved social worker may at any reasonable time visit and interview a patient for the purpose of deciding whether to make a recommendation⁴³. If, within the period of 14 days beginning with the day on which a supervision application has been accepted, the application, or any recommendation accompanying it, is found to be in any respect incorrect or defective, the application or recommendation may, within that period and with the consent of the primary care trust or health authority⁴⁴ which accepted the application, be amended by the person by whom it was made or given⁴⁵. A supervision application which appears to be duly made and to be accompanied by recommendations may be acted upon without further proof of the signature or qualification of the person by whom the application or any such recommendation was made or given, or of any matter of fact or opinion stated in the application or recommendation⁴⁶.

A recommendation accompanying a supervision application in respect of a patient cannot be given by the responsible medical officer, a person who receives or has an interest in the receipt

of any payments made on account of the maintenance of the patient, or a close relative⁴⁷ of the patient, of any person mentioned above, or of a person by whom the other recommendation is given for the purposes of the application⁴⁸.

1 For the meaning of 'responsible medical officer' see PARA 506 note 1 ante.

2 For the meaning of 'supervision application' see PARA 528 note 4.

3 le the requirements of the Mental Health Act 1983 s 25B(2) (as added) (see heads (1)-(3) in the text).

Section 25B (as added) applies with modification to certain patients admitted to hospital or placed under guardianship under Pt III (ss 35-55) (as amended): see ss 40(4), 41(5), 47(3), 48(3), 55(4), Sch 1 para 2 (as amended), Sch 1 para 8A (as added); and PARAS 487-488 ante. See the text and note 16 infra. In relation to other patients under Pt III (as amended), s 25B (as added and amended) is excluded by s 41(3)(aa) (as added): see PARAS 487-488 ante.

4 le the matters specified in ibid s 25B(4) (as added) (see the text and note 15 infra).

5 Ibid s 25B(1) (s 25B added by the Mental Health (Patients in the Community) Act 1995 s 1(1)).

6 Mental Health Act 1983 s 25B(2)(a)(i) (as added: see note 5 supra). For the meaning of 'patient' see PARA 435 ante.

7 As to the meaning of 'medical treatment' see PARA 552 post.

8 Mental Health Act 1983 s 25B(2)(a)(ii) (as added: see note 5 supra). For the meaning of 'hospital' see PARA 417 ante.

9 Ibid s 25B(2)(a)(iii) (as added: see note 5 supra). The services referred to in the text are those provided under s 117 (as amended): see PARAS 414, 428 ante.

10 Ibid s 25B(2)(a)(iv) (as added: see note 5 supra).

11 For the meaning of 'nearest relative' see PARA 453 ante.

12 Mental Health Act 1983 s 25B(2)(b) (as added: see note 5 supra). Where the patient has requested that this provision should not apply, it will not apply unless the patient has a propensity to violent or dangerous behaviour towards others, and the responsible medical officer considers that it is appropriate for the steps to be taken: s 25B(3) (as so added).

13 Ibid s 25B(2)(c) (as added: see note 5 supra).

14 le under ibid s 25D (as added) (see PARA 530 post).

15 Ibid s 25B(4) (as added: see note 5 supra).

16 Ibid s 25B(5)(a) (as added: see note 5 supra). This provision is modified so as to refer to an order or direction for admission or removal to hospital under Pt III (as amended) (see PARA 486 et seq ante) instead of to an application for admission for treatment: see note 3 supra.

17 Ibid s 25B(5)(b) (as added: see note 5 supra).

18 le those set out in ibid s 25A(4) (as added): see PARA 528 ante.

19 Ibid s 25B(5)(c) (as added: see note 5 supra).

20 'Community responsible medical officer', in relation to a patient subject to after-care under supervision, means the person who is in charge of medical treatment provided for him: ibid s 34(1) (definition added by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1, PARA 4(2)). See also the Mental Health Act 1983 s 117(2A) (as added); and PARA 428 ante.

21 Ibid s 25B(5)(d) (as added: see note 5 supra).

22 Ibid s 25B(5)(e)(i) (as added: see note 5 supra). The text refers to consultation in accordance with s 25B(2)(a)(iv) (as added): see head (1) in the text.

23 Ibid s 25B(5)(e)(ii) (as added: see note 5 supra). The text refers to consultation in accordance with s 25B(2)(b) (as added): see head (2) in the text.

24 Ie in the prescribed form: see the Mental Health (After-care under Supervision) Regulations 1996, SI 1996/294, reg 3(b), Sch 2 Form 2S.

25 For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.

26 Mental Health Act 1983 s 25B(6)(a) (as added: see note 5 supra). Such a recommendation must include a statement that in the medical practitioner's opinion, having regard in particular to the patient's history, all of the conditions set out in s 25A(4) (as added) (see PARA 528 ante) are complied with: s 25B(7) (as so added).

27 Ie in the prescribed form: see the Mental Health (After-care under Supervision) Regulations 1996, SI 1996/294, reg 3(c), Sch 2 Form 3S.

28 Mental Health Act 1983 Act s 25B(6)(b) (as added: see note 5 supra). Such a recommendation must include a statement that in the social worker's opinion, having regard in particular to the patient's history, all of the conditions set out in s 25A(4)(b) (as added) (see PARA 528 ante) are complied with: s 25B(8) (as so added). For the meaning of 'approved social worker' see PARA 427 ante.

29 Ibid s 25B(9)(a) (as added: see note 5 supra).

30 For the meaning of 'supervisor' see PARA 506 note 1 ante.

31 Mental Health Act 1983 s 25B(9)(b) (as added: see note 5 supra).

32 Ibid s 25B(9)(c) (as added: see note 5 supra).

33 Ie under ibid s 25D (as added) (see PARA 530 post).

34 Ibid s 25B(9)(d) (as added: see note 5 supra).

35 Ibid s 25B(10)(a) (as added: see note 5 supra).

36 Ibid s 25B(10)(b) (as added: see note 5 supra). The text refers to consultation in accordance with s 25B(2)(a)(iv) (as added): see head (1) in the text.

37 Ibid s 25B(10)(c) (as added: see note 5 supra). The text refers to consultation in accordance with s 25B(2)(b) (as added): see head (2) in the text.

38 Ibid s 25B(11)(a)-(d) (as added: see note 5 supra).

39 Ie under s 25B(6)(a) (as added) (see the text and note 26 supra).

40 Ibid s 25C(1) (s 25C added by the Mental Health (Patients in the Community) Act 1995 s 1(1)). For the meanings of these terms see PARAS 402-403 ante.

The Mental Health Act 1983 s 25C (as added and amended; prospectively amended) applies without modification to certain patients admitted to hospital or placed under guardianship under Pt III (as amended): see ss 40(4), 41(5), 47(3), 48(3), 55(4), Sch 1 Pt I para 1; and PARAS 487-488 ante. In relation to other patients under Pt III (as amended), s 25C (as added and amended; prospectively amended) is excluded by s 41(3)(aa) (as added): see PARAS 487-488 ante.

41 Ibid s 25C(2) (as added: see note 40 supra).

42 Ibid s 25C(3) (as added: see note 40 supra).

43 Ibid s 25C(4) (as added: see note 40 supra). For the purpose of deciding whether to make a recommendation in respect of a patient, a registered medical practitioner or an approved social worker may require the production of, and inspect, any records relating to the detention or treatment of the patient in any hospital, or to any after-care services provided for the patient under s 117 (as amended) (see PARAS 414, 428 ante): s 25C(5) (as so added).

44 For the meanings of 'primary care trust' and 'health authority' see PARA 414 note 6 ante.

45 Mental Health Act 1983 s 25C(6) (as added (see note 40 supra); and amended by the National Health Service Reform and Health Care Professions Act 2002 s 2(5), Sch 2 Pt 2 paras 42, 44). Where an application or recommendation is so amended, it has effect, and is deemed to have had effect, as if it had been originally made or given as so amended: Mental Health Act 1983 s 25C(7) (as so added).

46 Ibid s 25C(8) (as added: see note 40 supra).

47 'Close relative' means the husband, wife, father, father-in-law, mother, mother-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother-in-law, sister or sister-in-law: *ibid* s 25C(10) (as added: see note 40 supra). As from a day to be appointed, this definition is amended so as to refer also to civil partners: see s 25C(10) (as so added; prospectively amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 86(b)). At the date at which this volume states the law no such day had been appointed.

48 Mental Health Act 1983 s 25C(9) (as added: see note 40 supra).

UPDATE

528-534 After-care under Supervision

Replaced. Mental Health Act 1983 ss 25A-25J replaced by ss 17A-17G: see PARA 528A.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(11) AFTER-CARE UNDER SUPERVISION/530. Requirements to secure receipt of after-care under supervision.

530. Requirements to secure receipt of after-care under supervision.

Where a patient¹ is subject to after-care under supervision² or, if he has not yet left hospital³, is to be so subject after he leaves hospital, the responsible after-care bodies⁴ have power to impose any of the following requirements for the purpose of securing that the patient receives the after-care services provided for him⁵, namely that:

- 46 (1) the patient reside at a specified place⁶;
- 47 (2) the patient attend at specified places and times for the purpose of medical treatment⁷, occupation, education or training⁸; and
- 48 (3) access to the patient be given, at any place where the patient is residing, to the supervisor⁹, any registered medical practitioner¹⁰ or any approved social worker¹¹ or to any other person authorised by the supervisor¹².

A patient subject to after-care under supervision may be taken and conveyed by, or by any person authorised by, the supervisor to any place where the patient is required to reside or to attend for the purpose of medical treatment, occupation, education or training¹³. A person who demands to be given access to a patient¹⁴ or to take and convey a patient¹⁵, must, if asked to do so, produce some duly authenticated document to show that he is a person entitled to be given access to, or to take and convey, the patient¹⁶.

1 For the meaning of 'patient' see PARA 435 ante.

2 See PARA 528 ante.

3 For the meaning of 'hospital' see PARA 417 ante.

4 'Responsible after-care bodies', in relation to a patient, means the bodies which have, or will have, the duty under the Mental Health Act 1983 s 117 (as amended) (see PARAS 414, 428 ante) to provide after-care services for the patient: s 25D(2) (s 25D added by the Mental Health (Patients in the Community) Act 1995 s 1(1)).

5 Mental Health Act 1983 s 25D(1) (as added: see note 4 supra).

Section s 25D (as added) applies without modification to certain patients admitted to hospital or placed under guardianship under Pt III (as amended): see ss 40(4), 41(5), 47(3), 48(3), 55(4), Sch 1 Pt I para 1; and PARAS 487-488 ante. In relation to other patients under Pt III (as amended), s 25D (as added) is excluded by s 41(3) (aa) (as added): see PARAS 487-488 ante.

The requirement of supervision by itself is not within the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 5 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 127 et seq). The restrictions imposed (see heads (1)-(3) in text) are not intended to constitute a deprivation of liberty. The power to 'take and convey' is a form of arrest that must comply with the criteria in *Winterwerp v Netherlands* (1981) 4 EHRR 228, ECtHR, or be capable of classification as an emergency: *X v United Kingdom* (1981) 1 BMLR 98, ECtHR. See also *Kolanis v United Kingdom (Application 517/02)* [2005] All ER (D) 227 (Jun), ECtHR. Supervised discharge constitutes an interference within the Convention for the Protection of Human Rights and Fundamental Freedoms art 8 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 149 et seq), but is likely to be justified in the interests of the patient's health under art 8(2). The consent to treatment provisions of the Mental Health Act 1983 Pt IV (ss 56-64) (as amended) (see PARA 551 et seq post) do not apply. See also PARA 668 note 8 post.

6 Ibid s 25D(3)(a) (as added: see note 4 supra).

7 As to the meaning of 'medical treatment' see PARA 552 post.

- 8 Mental Health Act 1983 s 25D(3)(b) (as added: see note 4 supra).
- 9 For the meaning of 'supervisor' see PARA 506 note 1 ante.
- 10 For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.
- 11 For the meaning of 'approved social worker' see PARA 427 ante.
- 12 Mental Health Act 1983 s 25D(3)(c) (as added: see note 4 supra).
- 13 Ibid s 25D(4) (as added: see note 4 supra).
- 14 Ie where a requirement has been imposed on the patient under ibid s 25D(3)(c) (as added) (see head (3) in the text).
- 15 Ie in pursuance of ibid s 25D(4) (as added) (see the text and note 13 supra).
- 16 Ibid s 25D(5) (as added: see note 4 supra).

UPDATE

528-534 After-care under Supervision

Replaced. Mental Health Act 1983 ss 25A-25J replaced by ss 17A-17G: see PARA 528A.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(11) AFTER-CARE UNDER SUPERVISION/531. Review of, and reclassification of patient subject to, after-care under supervision.

531. Review of, and reclassification of patient subject to, after-care under supervision.

The after-care services provided¹ or to be provided for a patient² who is or is to be subject to after-care under supervision, and any requirements imposed on him³, must be kept under review and, where appropriate, modified by the responsible after-care bodies⁴.

Where a patient who is subject to after-care under supervision refuses or neglects to receive any or all of the after-care services provided for him, or to comply with any or all of any requirements imposed on him⁵, the responsible after-care bodies must review and, where appropriate, modify, the after-care services provided for him⁶ and any requirements imposed on him⁷. The bodies must also consider whether it might be appropriate for him to cease to be subject to after-care under supervision and, if they conclude that it might be so, they must inform the community responsible medical officer⁸, and consider whether it might be appropriate for him to be admitted to a hospital for treatment and, if they conclude that it might be so, they must inform an approved social worker⁹.

The responsible after-care bodies must not modify the after-care services provided or to be provided for a patient who is or is to be subject to after-care under supervision, or modify any requirements imposed on him¹⁰, unless:

- 49 (1) the patient has been consulted about the modifications¹¹;
- 50 (2) any person who the responsible after-care bodies believe plays or will play a substantial part in the care of the patient but is not or will not be professionally concerned with the after-care services provided for the patient, has been consulted about the modifications¹²;
- 51 (3) such steps as are practicable have been taken to consult the person, if any, appearing to be the nearest relative¹³ of the patient about the modifications¹⁴; and
- 52 (4) the responsible after-care bodies have taken into account any views expressed by the persons consulted¹⁵.

Where the responsible after-care bodies modify the after-care services provided or to be provided for the patient, or any requirements imposed on him, they must:

- 53 (a) inform the patient both orally and in writing¹⁶;
- 54 (b) inform any person who has been consulted because it is believed that he plays or will play a substantial part in the care of the patient but is not or will not be professionally concerned with the after-care services provided for the patient¹⁷; and
- 55 (c) inform in writing any person who has been consulted because he appears to be the nearest relative of the patient, that the modifications have been made¹⁸.

Where: (i) a person other than the person named in the supervision application¹⁹ becomes the community responsible medical officer when the patient leaves hospital²⁰; or (ii) when the patient is subject to after-care under supervision, one person ceases to be, and another becomes, the community responsible medical officer²¹; or (iii) a person other than the person named in the supervision application becomes the supervisor²² when the patient leaves hospital²³; or (iv) when the patient is subject to after-care under supervision, one person ceases to be, and another becomes, the supervisor²⁴, the responsible after-care bodies must: (A) inform

the patient both orally and in writing²⁵; (B) inform any person who they believe plays a substantial part in the care of the patient but is not professionally concerned with the after-care services provided for the patient²⁶; and (c) unless the patient otherwise requests, take such steps as are practicable to inform in writing the person, if any, appearing to be the nearest relative of the patient²⁷, of the name of the person who becomes the community responsible medical officer or the supervisor²⁸.

If it appears to the community responsible medical officer that a patient subject to after-care under supervision is suffering from a form of mental disorder²⁹ other than the form or forms specified in the supervision application made in respect of the patient, he may furnish a report³⁰ to that effect to the primary care trust or health authority³¹ which has the duty to provide after-care services for the patient³². Where a report is so furnished, the supervision application has effect as if that other form of mental disorder were specified in it³³. Unless no one other than the community responsible medical officer is professionally concerned with the patient's medical treatment³⁴, he must consult one or more persons who are so concerned before furnishing such a report³⁵. Where a report is furnished in respect of a patient, the responsible after-care bodies must inform the patient both orally and in writing, and, unless the patient otherwise requests, take such steps as are practicable to inform in writing the person, if any, appearing to be the nearest relative of the patient, that the report has been furnished³⁶.

1 le under the Mental Health Act 1983 s 117 (as amended): see PARAS 414, 428 ante.

2 For the meaning of 'patient' see PARA 435 ante.

3 le under the Mental Health Act 1983 s 25D (as added): see PARA 530 ante.

4 Ibid s 25E(1) (s 25E added by the Mental Health (Patients in the Community) Act 1995 s 1(1)). For the meaning of 'responsible after-care bodies' see PARA 530 note 4 ante.

The Mental Health Act 1983 s 25E (as added) applies without modification to certain patients admitted to hospital or placed under guardianship under Pt III (ss 35-55) (as amended): see ss 40(4), 41(5), 47(3), 48(3), 55(4), Sch 1 Pt I para 1; and PARAS 487-488 ante. In relation to other patients under Pt III (as amended), s 25E (as added) is excluded by s 41(3)(aa) (as added): see PARAS 487-488 ante.

5 Ibid s 25E(2) (as added: see note 4 supra).

6 Ibid s 25E(3)(a) (as added: see note 4 supra).

7 Ibid s 25E(3)(b) (as added: see note 4 supra).

8 Ibid s 25E(4)(a) (as added: see note 4 supra). For the meaning of 'community responsible medical officer' see PARA 529 note 20 ante.

9 Ibid s 25E(4)(b) (as added: see note 4 supra).

10 Ibid s 25E(5) (as added: see note 4 supra).

11 Ibid s 25E(6)(a) (as added: see note 4 supra).

12 Ibid s 25E(6)(b) (as added: see note 4 supra).

13 For the meaning of 'nearest relative' see PARA 453 ante.

14 Mental Health Act 1983 s 25E(6)(c) (as added: see note 4 supra). Where the patient has requested that s 25E(6)(c) (as added) should not apply, it will not apply unless the patient has a propensity to violent or dangerous behaviour towards others, and the community responsible medical officer, or the person who is to be the community responsible medical officer, considers that it is appropriate for the steps to be taken: s 25E(7) (as so added).

15 Ibid s 25E(6)(d) (as added: see note 4 supra).

16 Ibid s 25E(8)(a) (as added: see note 4 supra).

- 17 Ibid s 25E(8)(b) (as added: see note 4 supra).
- 18 Ibid s 25E(8)(c) (as added: see note 4 supra).
- 19 For the meaning of 'supervision application' see PARA 528 note 4 ante.
- 20 Mental Health Act 1983 s 25E(9)(a) (as added: see note 4 supra).
- 21 Ibid s 25E(9)(b) (as added: see note 4 supra).
- 22 For the meaning of 'supervisor' see PARA 506 note 1 ante.
- 23 Mental Health Act 1983 s 25E(10)(a) (as added: see note 4 supra). For the meaning of 'hospital' see PARA 417 ante.
- 24 Ibid s 25E(10)(b) (as added: see note 4 supra).
- 25 Ibid s 25E(11)(a) (as added: see note 4 supra).
- 26 Ibid s 25E(11)(b) (as added: see note 4 supra).
- 27 Ibid s 25E(11)(c) (as added: see note 4 supra).
- 28 Ibid s 25E(11) (as added: see note 4 supra).
- 29 For the meaning of 'mental disorder' see PARA 402 ante.
- 30 The report must be in the form prescribed by the Mental Health (After-care under Supervision) Regulations 1996, SI 1996/294, reg 3(d), Sch 2 Form 4S.
- 31 For the meanings of 'primary care trust' and 'health authority' see PARA 414 note 6 ante.
- 32 Mental Health Act 1983 s 25F(1) (s 25F added by the Mental Health (Patients in the Community) Act 1995 s 1(1); and the Mental Health Act 1983 s 25F(1) amended by the National Health Service Reform and Health Care Professions Act 2002 s 2(5), Sch 2 Pt 2 paras 42, 45).
The Mental Health Act 1983 s 25F (as added and amended) applies without modification to certain patients admitted to hospital or placed under guardianship under Pt III (as amended): see ss 40(4), 41(5), 47(3), 48(3), 55(4), Sch 1 Pt I para 1; and PARAS 487-488 ante. In relation to other patients under Pt III (as amended), s 25F (as added and amended) is excluded by s 41(3)(aa) (as added): see PARAS 487-488 ante.
- 33 Ibid s 25F(2) (as added: see note 32 supra).
- 34 As to the meaning of 'medical treatment' see PARA 552 post.
- 35 Mental Health Act 1983 s 25F(3) (as added: see note 32 supra).
- 36 Ibid s 25F(4) (as added: see note 32 supra).

UPDATE

528-534 After-care under Supervision

Replaced. Mental Health Act 1983 ss 25A-25J replaced by ss 17A-17G: see PARA 528A.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(11) AFTER-CARE UNDER SUPERVISION/532. Duration and renewal of after-care under supervision.

532. Duration and renewal of after-care under supervision.

A patient¹ subject to after-care under supervision² is so subject for the period beginning when he leaves hospital³ and ending with the period of six months beginning with the day on which the supervision application⁴ was accepted, but he will not be so subject for any longer period except in accordance with the following provisions⁵. A patient already subject to after-care under supervision may be made so subject from the end of the above-mentioned period, for a further period of six months, and from the end of any such period of renewal for a further period of one year, and so on for periods of one year at a time⁶.

Within the period of two months ending on the day on which a patient who is subject to after-care under supervision will cease to be so subject, it is the duty of the community responsible medical officer⁷ to examine the patient, and, if it appears to him that the following conditions are complied with, to furnish to the responsible after-care bodies⁸ a report to that effect in the prescribed form⁹. The conditions are that:

- 56 (1) the patient is suffering from mental disorder, being mental illness, severe mental impairment, psychopathic disorder or mental impairment¹⁰;
- 57 (2) there will be a substantial risk of serious harm to the health or safety of the patient or the safety of other persons, or of the patient being seriously exploited, if he were not to receive the after-care services provided¹¹ for him¹²; and
- 58 (3) his being subject to after-care under supervision is likely to help to secure that he receives the after-care services so provided¹³.

The community responsible medical officer must not consider whether these conditions are complied with unless:

- 59 (a) the following persons have been consulted, namely:
 - 1
 - 1. (i) the patient¹⁴;
 - 2. (ii) the supervisor¹⁵;
 - 3. (iii) unless no one other than the community responsible medical officer is professionally concerned with the patient's medical treatment¹⁶, one or more persons who are so concerned¹⁷;
 - 4. (iv) one or more persons who are professionally concerned with the after-care services, other than medical treatment, provided for the patient¹⁸; and
 - 5. (v) any person who the community responsible medical officer believes plays a substantial part in the care of the patient but is not professionally concerned with the after-care services so provided¹⁹;
 - 2
 - 60 (b) such steps as are practicable have been taken to consult the person, if any, appearing to be the nearest relative²⁰ of the patient²¹; and
 - 61 (c) the community responsible medical officer has taken into account any relevant views expressed by the persons consulted²².

Where a report²³ is duly furnished, the patient is thereby made subject to after-care under supervision for the further period prescribed in that case²⁴. Where a report is furnished, the responsible after-care bodies must:

- 62 (A) inform the patient both orally and in writing that the report has been furnished, and of the effect in his case of the provisions relating to making a patient subject to after-care under supervision for a further period²⁵;
- 63 (B) inform any person who has been consulted because the community responsible medical officer believes that he plays a substantial part in the care of the patient but is not professionally concerned with the after-care services so provided, that the report has been furnished²⁶; and
- 64 (C) inform in writing the nearest relative of the patient who has been consulted, that the report has been furnished²⁷.

1 For the meaning of 'patient' see PARA 435 ante.

2 See PARA 528 ante.

3 For the meaning of 'hospital' see PARA 417 ante.

4 For the meaning of 'supervision application' see PARA 528 note 4 ante.

5 Mental Health Act 1983 s 25G(1) (s 25G added by the Mental Health (Patients in the Community) Act 1995 s 1(1)).

The Mental Health Act 1983 s 25G (as added) applies without modification to certain patients admitted to hospital or placed under guardianship under Pt III (ss 35-55) (as amended): see ss 40(4), 41(5), 47(3), 48(3), 55(4), Sch 1 Pt I para 1; and PARAS 487-488 ante. In relation to other patients under Pt III (as amended), s 25G (as added) is excluded by s 41(3)(aa) (as added): see PARAS 487-488 ante.

6 Ibid s 25G(2) (as added: see note 5 supra).

7 For the meaning of 'community responsible medical officer' see PARA 529 note 20 ante.

8 For the meaning of 'responsible after-care bodies', see PARA 530 note 4 ante.

9 Mental Health Act 1983 s 25G(3) (as added: see note 5 supra). Where the form of mental disorder specified in such a report is a form of disorder other than that specified in the supervision application, that application has effect as if that other form of mental disorder were specified in it: s 25G(9) (as so added). Where on any occasion a report specifying such a form of mental disorder is furnished, the community responsible medical officer need not furnish a report under s 25F (as added and amended) (see PARA 531 ante): s 25G(10) (as so added). As to the prescribed form see the Mental Health (After-care under Supervision) Regulations 1996, SI 1996/294, reg 3(e), Sch 2 Form 5S (amended by SI 2002/2469).

10 Mental Health Act 1983 s 25G(4)(a) (as added: see note 5 supra). For the meanings of these terms see PARAS 402-403 ante.

11 Ie under ibid s 117 (as amended): see PARAS 414, 428 ante.

12 Ibid s 25G(4)(b) (as added: see note 5 supra).

13 Ibid s 25G(4)(c) (as added: see note 5 supra).

14 Ibid s 25G(5)(a)(i) (as added: see note 5 supra).

15 Ibid s 25G(5)(a)(ii) (as added: see note 5 supra). For the meaning of 'supervisor' see PARA 506 note 1 ante.

16 As to the meaning of 'medical treatment' see PARA 552 post.

17 Mental Health Act 1983 s 25G(5)(a)(iii) (as added: see note 5 supra).

18 Ibid s 25G(5)(a)(iv) (as added: see note 5 supra).

19 Ibid s 25G(5)(a)(v) (as added: see note 5 supra).

20 For the meaning of 'nearest relative' see PARA 453 ante.

21 Mental Health Act 1983 s 25G(5)(b) (as added: see note 5 supra). Where the patient has requested that s 25G(5)(b) (as added) should not apply, it will not apply unless the patient has a propensity to violent or dangerous behaviour towards others, and the community responsible medical officer, or the person who is to be the community responsible medical officer, considers that it is appropriate for the steps to be taken: s 25G(6) (as so added).

22 Ibid s 25G(5)(c) (as added: see note 5 supra).

23 Ie under ibid s 25G(3) (as added) (see the text and note 9 supra).

24 Ibid s 25G(7) (as added: see note 5 supra). The period is prescribed by reference to s 25G(2) (as added) (see the text and note 6 supra). As to the prescribed form to be used on the renewal of after-care under supervision see the Mental Health (After-care under Supervision) Regulations 1996, SI 1996/294, reg 3(f), Sch 2 Forms 5S Pt II (amended by SI 2002/2469).

25 Mental Health Act 1983 s 25G(8)(a) (as added: see note 5 supra). In particular, a patient must be informed of what rights are available for applying to a mental health review tribunal: s 25G(8)(a) (as so added).

26 Ibid s 25G(8)(b) (as added: see note 5 supra).

27 Ibid s 25G(8)(c) (as added: see note 5 supra).

UPDATE

528-534 After-care under Supervision

Replaced. Mental Health Act 1983 ss 25A-25J replaced by ss 17A-17G: see PARA 528A.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(11) AFTER-CARE UNDER SUPERVISION/533. Ending of after-care under supervision.

533. Ending of after-care under supervision.

The community responsible medical officer¹ may at any time direct that a patient² subject to after-care under supervision is to cease to be so subject³. The community responsible medical officer must not give such a direction unless the following provisions are complied with⁴, namely that:

- 65 (1) the following persons have been consulted about the giving of the direction:³
 - 6. (a) the patient⁵;
 - 7. (b) the supervisor⁶;
 - 8. (c) unless no one other than the community responsible medical officer is professionally concerned with the patient's medical treatment⁷, one or more persons who are so concerned⁸;
 - 9. (d) one or more persons who are professionally concerned with the after-care services⁹, other than medical treatment, provided for the patient¹⁰; and
 - 10. (e) any person who the community responsible medical officer believes plays a substantial part in the care of the patient but is not professionally concerned with the after-care services so provided¹¹;
- 4 66 (2) such steps as are practicable have been taken to consult the person, if any, appearing to be the nearest relative¹² of the patient about the giving of the direction¹³; and
- 67 (3) the community responsible medical officer has taken into account any views expressed by the persons consulted¹⁴.

A patient subject to after-care under supervision ceases to be so subject if he is admitted to a hospital¹⁵ in pursuance of an application for admission for treatment¹⁶ or if he is received into guardianship¹⁷.

Where a patient, for any reason, ceases to be subject to after-care under supervision, the responsible after-care bodies¹⁸ must:

- 68 (i) inform the patient both orally and in writing¹⁹;
- 69 (ii) inform any person who they believe plays a substantial part in the care of the patient but is not professionally concerned with the after-care services provided for the patient²⁰; and
- 70 (iii) take such steps as are practicable to inform in writing the person, if any, appearing to be the nearest relative of the patient²¹,

that the patient has ceased to be so subject²².

1 For the meaning of 'community responsible medical officer' see PARA 529 note 20 ante.

2 For the meaning of 'patient' see PARA 435 ante.

3 Mental Health Act 1983 s 25H(1) (s 25H added by the Mental Health (Patients in the Community) Act 1995 s 1(1)). As to the prescribed form to be used in making such a direction see the Mental Health (After-care under Supervision) Regulations 1996, SI 1996/294, reg 3(g), Sch 2 Form 6S (amended by SI 2002/2469).

The Mental Health Act 1983 s 25H (as added) applies without modification to certain patients admitted to hospital or placed under guardianship under Pt III (ss 35-55) (as amended): see ss 40(4), 41(5), 47(3), 48(3), 55(4), Sch 1 Pt I para 1; and PARAS 487-488 ante. In relation to other patients under Pt III (as amended), s 25H (as added) is excluded by s 41(3)(aa) (as added): see PARAS 487-488 ante.

After-care under supervision can also be ended by the mental health review tribunal under s 72(4A) (as added) (see PARA 573 post), but not by the nearest relative (see PARA 453 ante).

4 Ibid s 25H(2) (as added: see note 3 supra).

5 Ibid s 25H(3)(a)(i) (as added: see note 3 supra).

6 Ibid s 25H(3)(a)(ii) (as added: see note 3 supra). For the meaning of 'supervisor' see PARA 506 note 1 ante.

7 As to the meaning of 'medical treatment' see PARA 552 post.

8 Mental Health Act 1983 s 25H(3)(a)(iii) (as added: see note 3 supra).

9 le under ibid s 117 (as amended): see PARAS 414, 428 ante.

10 Ibid s 25H(3)(a)(iv) (as added: see note 3 supra).

11 Ibid s 25H(3)(a)(v) (as added: see note 3 supra).

12 For the meaning of 'nearest relative' see PARA 453 ante.

13 Mental Health Act 1983 s 25H(3)(b) (as added: see note 3 supra). Where the patient has requested that s 25H(3)(b) (as added) should not apply, it will not apply unless the patient has a propensity to violent or dangerous behaviour towards others, and the community responsible medical officer, or the person who is to be the community responsible medical officer, considers that it is appropriate for the steps to be taken: s 25H(4) (as so added).

14 Ibid s 25H(3)(c) (as added: see note 3 supra).

15 For the meaning of 'hospital' see PARA 417 ante.

16 Mental Health Act 1983 s 25H(5)(a) (as added: see note 3 supra). For the meaning of 'application for admission for treatment' see PARA 454 note 2 ante. See also PARA 461 ante.

17 Ibid s 25H(5)(b) (as added: see note 3 supra). As to guardianship see PARA 469 et seq ante.

18 For the meaning of 'responsible after-care bodies' see PARA 530 note 4 ante.

19 Mental Health Act 1983 s 25H(6)(a) (as added: see note 3 supra).

20 Ibid s 25H(6)(b) (as added: see note 3 supra).

21 Ibid s 25H(6)(c) (as added: see note 3 supra).

22 Ibid s 25H(6) (as added: see note 3 supra).

UPDATE

528-534 After-care under Supervision

Replaced. Mental Health Act 1983 ss 25A-25J replaced by ss 17A-17G: see PARA 528A.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(11) AFTER-CARE UNDER SUPERVISION/534. Special provisions as to patients sentenced to imprisonment etc.

534. Special provisions as to patients sentenced to imprisonment etc.

At any time where a patient¹ who is subject to after-care under supervision²: (1) is detained in custody in pursuance of any sentence or order passed or made by a court in the United Kingdom³; or (2) is detained in hospital⁴ in pursuance of an application for admission for assessment⁵, he is not required to receive any after-care services provided for him⁶ or to comply with any requirements imposed on him⁷.

If the patient is detained as mentioned in head (1) above for a period of, or successive periods amounting in the aggregate to, six months or less, or is detained as mentioned in head (2) above, and⁸ he would have ceased to be subject to after-care under supervision during the period for which he is so detained⁹ or would cease to be so subject during the period of 28 days beginning with the day on which he ceases to be so detained¹⁰, he is deemed not to have ceased, and must not cease, to be so subject until the end of that period of 28 days¹¹.

Where the period for which the patient is subject to after-care under supervision is so extended¹², any examination and report to be made and furnished in respect of the patient¹³ may be made and furnished within the period as so extended¹⁴. Where¹⁵ the patient is made subject to after-care under supervision for a further period after the day on which¹⁶ he would have ceased to be so subject, the further period is deemed to have commenced with that day¹⁷.

1 For the meaning of 'patient' see PARA 435 ante.

2 See PARA 528 ante.

3 Mental Health Act 1983 s 25I(1)(a), (2) (s 25I added by the Mental Health (Patients in the Community) Act 1995 s 1(1)). Such an order includes an order committing or remanding the patient in custody. For the meaning of 'United Kingdom' see PARA 406 note 18 ante.

The Mental Health Act 1983 s 25I (as added) applies without modification to certain patients admitted to hospital or placed under guardianship under Pt III (ss 35-55) (as amended): see ss 40(4), 41(5), 47(3), 48(3), 55(4), Sch 1 Pt I para 1; and PARAS 487-488 ante. In relation to other patients under Pt III (as amended), s 25I (as added) is excluded by s 41(3)(aa) (as added): see PARAS 487-488 ante.

4 For the meaning of 'hospital' see PARA 417 ante.

5 Mental Health Act 1983 s 25I(1)(a), (2) (as added: see note 3 supra). For the meaning of 'application for admission for assessment' see PARA 454 note 1 ante. See also PARA 460 ante.

6 Ibid s 25I(2)(a) (as added: see note 3 supra). Such services are provided under s 117 (as amended): see PARAS 414, 428 ante.

7 Ibid s 25I(2)(b) (as added: see note 3 supra). Such requirements are imposed under s 25D (as added): see PARA 530 ante.

8 Ie apart from ibid s 25I(3) (as added): see the text and notes 9-11 infra.

9 Ibid s 25I(3)(a) (as added: see note 3 supra).

10 Ibid s 25I(3)(b) (as added: see note 3 supra).

11 Ibid s 25I(3) (as added: see note 3 supra).

12 Ie by s 25I(3) (as added): see the text and notes 9-11 supra.

13 Ie under s 25G(3) (as added): see PARA 532 ante.

- 14 Ibid s 25I(4) (as added: see note 3 supra).
- 15 le by virtue of ibid s 25I(4) (as added): see the text and note 14 supra.
- 16 le apart from ibid s 25I(3) (as added): see the text and notes 9-11 supra.
- 17 Ibid s 25I(5) (as added: see note 3 supra).

UPDATE

528-534 After-care under Supervision

Replaced. Mental Health Act 1983 ss 25A-25J replaced by ss 17A-17G: see PARA 528A.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(12) TRANSFER AND REMOVAL OF PRISONERS TO HOSPITAL/535. Removal to hospital of persons serving sentences of imprisonment.

(12) TRANSFER AND REMOVAL OF PRISONERS TO HOSPITAL

535. Removal to hospital of persons serving sentences of imprisonment.

If a person is serving a sentence of imprisonment¹, and the Secretary of State² is satisfied, by reports³ from at least two registered medical practitioners⁴: (1) that that person is suffering from mental illness, psychopathic disorder, mental impairment or severe mental impairment⁵; and (2) that the mental disorder⁶ from which the person is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital⁷ for medical treatment⁸ and in the case of psychopathic disorder or mental impairment that such treatment is likely to alleviate or prevent a deterioration of his condition⁹, then if the Secretary of State is of the opinion having regard to the public interest and all the circumstances that it is expedient to do so, he may by warrant direct that that person be removed to and detained in such hospital as may be specified in the direction¹⁰. Such a direction, which is referred to as a 'transfer direction'¹¹, ceases to be effective if the prisoner is not received into the hospital specified within a period of 14 days beginning with the date on which it is given¹².

A transfer direction with respect to any person has the same effect as a hospital order¹³ made in his case¹⁴. It must specify the form or forms of mental disorder¹⁵ from which, on the reports made by the medical practitioners concerned, the patient¹⁶ is found by the Secretary of State to be suffering¹⁷. No transfer direction may be given unless the patient is described in each of those reports as suffering from the same one of those forms of mental disorder, whether or not he is also described in either of them as suffering from another of those forms¹⁸.

1 References in this provision to a person serving a sentence of imprisonment include references: (1) to a person detained in pursuance of any sentence or order for detention made by a court in criminal proceedings (other than an order made in consequence of a finding of insanity or unfitness to stand trial: see PARA 499 ante); (2) to a person committed to custody under the Magistrates' Courts Act 1980 s 115(3) (which relates to persons who fail to comply with an order to enter into recognisances to keep the peace or be of good behaviour: see MAGISTRATES VOL 29(2) (Reissue) PARA 848); and (3) to a person committed by a court to a prison or other institution to which the Prison Act 1952 applies (see PRISONS) in default of payment of any sum adjudged to be paid on his conviction: Mental Health Act 1983 s 47(5)(a)-(c) (amended by the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 para 18); Mental Health Act 1983 s 55(6).

2 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

3 The reports must comply with the provisions of the Mental Health Act 1983 ss 12, 54(1) (as amended): see PARAS 482, 492 ante. As to reliable reports see *R v Secretary of State for the Home Department, ex p Gilkes* (1999) 1 MHLR 6.

4 For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.

In practice, the Home Secretary is likely to want one of the two doctors to be practising at the hospital named in the proposed transfer direction so as to ensure agreement as to the patient's reception by the hospital and his diagnosis, treatability and detention: see *R (on the application of D) v Secretary of State for the Home Department* [2004] EWHC 2857 (Admin), [2004] All ER (D) 250 (Dec).

5 Mental Health Act 1983 s 47(1)(a). For the meanings of these terms see PARAS 402-403 ante.

6 For the meaning of 'mental disorder' see PARA 402 ante.

7 For the meaning of 'hospital' see PARA 417 ante.

8 As to the meaning of 'medical treatment' see PARA 552 post.

9 Mental Health Act 1983 s 47(1)(b). See *R (on the application of South West London and St George's Mental Health NHS Trust) v W* [2002] All ER (D) 62 (Aug) (transfer to hospital of patient classified as psychopathically disordered; staged discharge through hospital was capable of amounting to treatment which was likely to prevent a deterioration in his condition).

10 Mental Health Act 1983 s 47(1) (amended by the Crime (Sentences) Act 1997 ss 49(3), 56(2), Sch 6). Any power to specify a hospital conferred by the Mental Health Act 1983 s 47 (as amended) includes power to specify a hospital unit; and, where such a unit is specified in relation to any person in the exercise of such a power, any reference in any enactment (including one contained in the Crime (Sentences) Act 1997) to him being, or being liable to be, detained in a hospital is to be construed accordingly (although this does not apply unless the court also gives a direction under the Mental Health Act 1983 s 49 (see PARA 537 post)): Crime (Sentences) Act 1997 s 47(1)(c), (2)(b).

The prisoner's sentence and any licence period and conditions, including prospect of recall to prison, continue to run notwithstanding transfer to hospital: *R (on the application of Miah) v Secretary of State for the Home Department* [2004] EWHC 2569 (Admin), [2005] All ER (D) 22 (Jan). See also the Prison Act 1952 s 22(2)(b) (as amended); and PRISONS vol 36(2) (Reissue) PARA 582.

Delay in a transfer is not an infringement of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 8 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 149 et seq) where the delay was due to difficulties in satisfying conditions for the exercise of the statutory power, especially if the diagnosis was uncertain and there were few places available: *R (on the application of D) v Secretary of State for the Home Department* [2004] EWHC 2857 (Admin), [2004] All ER (D) 250 (Dec) (in this case it was held that the Home Secretary has a duty to act expeditiously on receipt of information as to the possible need for a transfer and on receipt of medical reports; and suggestions were made as to the setting-up of a central database of hospitals for placement finding).

Failure to transfer is judicially reviewable if the mentally disordered prisoner demonstrates that he is denied medical treatment: *R v Drew* [2003] UKHL 25, [2003] 4 All ER 557. As to the High Court's jurisdiction to direct the Secretary of State to order transfer see *R (on the application of D) v Secretary of State for the Home Department* supra. As to appropriate conditions of detention see *Aerts v Belgium* (1998) 29 EHRR 50, ECtHR.

11 Mental Health Act 1983 ss 47(1), 145(1).

12 Ibid s 47(2).

13 See *ibid* s 37(1) (as amended); and PARA 491 ante. Consequently, the provisions of Pt II (ss 2-34) (as amended) apply to a patient detained in pursuance of a transfer direction without restrictions as they do to a patient detained in pursuance of a hospital order without restrictions: see ss 40(4), 55(4); and PARA 494 ante. Where the Secretary of State, when giving a transfer direction, also gives a restriction direction (see PARA 537 post), the provisions of Pt II (as amended) apply as they apply to a patient detained in pursuance of a hospital order with an order restricting discharge: see ss 40(4), 41(3), 55(4) (s 41(3) as amended); and PARA 487 ante. For the meaning of 'hospital order' see PARA 491 note 5 ante.

14 Ibid s 47(3).

15 As to the forms of mental disorder see the text to note 5 supra.

16 For the meaning of 'patient' see PARA 435 ante.

17 Mental Health Act 1983 s 47(4).

18 Ibid s 47(4).

UPDATE

535 Removal to hospital of persons serving sentences of imprisonment

NOTE 1--Mental Health Act 1983 s 47(5)(a) further amended, s 47(6) added: Armed Forces Act 2006 Sch 16 para 97.

TEXT AND NOTES 4-10--Now, head (1) that that person is suffering from mental disorder; in head (2) words 'and in the case of ... his condition' omitted; and new head (3) that appropriate medical treatment (see PARA 461) is available for him: Mental Health Act 1983 s 47(1) (amended by Mental Health Act 2007 s 4(7), Sch 1 para 10).

NOTE 10--See *R (on the application of TF) v Secretary of State for Justice* [2008] EWCA Civ 1457, (2009) 106 BMLR 54 (judge had no power to render lawful detention in a hospital where he found transfer of patient was unlawful).

TEXT AND NOTES 15-18--Repealed: Mental Health Act 2007 Sch 11 Pt 1.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(12) TRANSFER AND REMOVAL OF PRISONERS TO HOSPITAL/536. Removal to hospital of other prisoners.

536. Removal to hospital of other prisoners.

If the Secretary of State¹ is satisfied by the same reports as are required in the case of persons serving sentences of imprisonment², that any one of the following persons is suffering from mental illness or severe mental impairment³ of a nature or degree which warrants his detention in a hospital⁴ for medical treatment⁵, and is also satisfied that the person is in urgent need of such treatment⁶, the Secretary of State has the same power of giving a transfer direction⁷ as if he were a person serving such a sentence⁸. Those persons are: (1) persons detained in a prison or remand centre, not being persons serving a sentence of imprisonment or falling within heads (2) to (4) below⁹; (2) persons remanded in custody by a magistrates' court¹⁰; (3) civil prisoners, that is to say persons committed by a court to prison for a limited term¹¹, but not being persons falling to be dealt with under the provisions¹² relating to the removal to hospital of persons serving prison sentences¹³; and (4) persons detained under the Immigration Act 1971 or the Nationality, Immigration and Asylum Act 2002¹⁴.

1 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

2 See PARA 535 ante.

3 Persons suffering from psychopathic disorder or mental impairment are not within the terms of the Mental Health Act 1983 s 48 (as amended) (nor can they be remanded to hospital for treatment under s 36: see PARA 489 ante). Such persons may be less likely than the mentally ill or severely mentally impaired to be in urgent need of hospital treatment during a comparatively short period of committal or remand in custody. For the meanings of 'psychopathic order' and 'mental impairment' see PARA 403 ante.

4 For the meaning of 'hospital' see PARA 417 ante.

5 As to the meaning of 'medical treatment' see PARA 552 post.

6 See the Mental Health Act 1983 s 35; and PARA 489 ante.

7 For the meaning of 'transfer direction' see PARA 535 note 11 ante.

8 Mental Health Act 1983 s 48(1). The provisions of s 47(2)-(4) (see PARA 535 ante) apply for the purposes of s 48 (as amended) and of any transfer direction given by virtue of s 48 (as amended) as they apply for the purposes of s 47 (as amended) and of any transfer direction under s 47 (as amended): s 48(3).

9 Ibid s 48(2)(a). As from a day to be appointed, this provision is amended so as to omit the reference to a remand centre: see s 48(2)(a) (prospectively amended by the Criminal Justice and Court Services Act 2000 ss 74, 75, Sch 7 Pt II paras 72, 73, Sch 8). At the date at which this volume states the law no such day had been appointed.

Where the Secretary of State gives a transfer direction in respect of any such person he must also give a restriction direction: see the Mental Health Act 1983 s 49(1); and PARA 537 post. As to restriction directions see PARA 537 post.

10 Ibid s 48(2)(b). Where the Secretary of State gives a transfer direction in respect of any such person he must also give a restriction direction: see s 49(1); and PARA 537 post. As to magistrates' courts see MAGISTRATES vol 29(2) (Reissue) PARA 583 et seq.

11 Persons committed to prison for contempt of court must now be committed for a fixed term and are therefore included: see the Contempt of Court Act 1981 s 14(1). The court also has power to make a hospital order as if a person committed for contempt had been convicted: see s 14(4) (as amended); and PARA 491 ante. As to committal for contempt of court see CONTEMPT OF COURT vol 9(1) (Reissue) PARA 493.

12 Ie under the Mental Health Act 1983 s 47 (as amended): see PARA 535 ante.

13 Ibid s 48(2)(c) (amended by the Statute Law (Repeals) Act 2004).

14 Mental Health Act 1983 s 48(2)(d) (amended by the Nationality, Immigration and Asylum Act 2002 s 62(10)(a)). The reference in the text is a reference to persons detained under the Immigration Act 1971 or the Nationality, Immigration and Asylum Act 2002 s 62 (as amended): see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (Reissue) PARA 156 et seq.

UPDATE

536 Removal to hospital of other prisoners

TEXT AND NOTES 3, 4--Reference to mental illness or severe mental impairment is now to mental disorder, which must be of a nature or degree making it appropriate for the person to be detained in a hospital for medical treatment; the Secretary of State must also be satisfied that appropriate medical treatment (see PARA 461) is available for that person: Mental Health Act 1983 s 48(1) (amended by Mental Health Act 2007 s 5(3), Sch 1 para 11(a)).

NOTE 8--Reference to Mental Health Act 1983 s 47(2)-(4) now to s 47(2), (3): s 48(3) (amended by Mental Health Act 2007 s 5(3), Sch 1 para 11(b)).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(12) TRANSFER AND REMOVAL OF PRISONERS TO HOSPITAL/537. Direction restricting discharge of prisoner removed to hospital.

537. Direction restricting discharge of prisoner removed to hospital.

Where the Secretary of State¹ gives a transfer direction in respect of any person², he may, if he thinks fit³, by warrant further direct that that person is to be subject to the same special restrictions on discharge as would be imposed by a restriction order made by a court⁴; and, where the Secretary of State gives a transfer direction in respect of a person committed or remanded in custody awaiting trial or sentence⁵ or in respect of a person ordered by the Court of Appeal⁶ to be kept in continued detention pending trial after a successful appeal against findings that he is under a disability and did the acts or made the omission charged⁷, he must give a restriction direction⁸. A restriction direction has the same effect as a restriction order⁹.

1 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

2 As to the giving of transfer directions see PARAS 535-536 ante.

3 The Secretary of State is not bound to give a restriction direction in all cases in which he gives a transfer direction but he must give a restriction direction in respect of persons falling within the Mental Health Act 1983 s 48(2)(a) (prospectively amended) or s 48(2)(b): see PARA 536 ante.

4 I.e. a restriction order under *ibid* s 41 (as amended) (see PARA 496 ante): s 49(1). A court must hear oral evidence from at least one of the registered medical practitioners whose evidence is taken into account when making the relevant hospital order: see s 41(2); and PARA 496 ante. There is no corresponding requirement in the case of the Secretary of State, although he would no doubt rely on medical advice. The effect of the special restrictions on discharge imposed by a restriction order or restriction direction is that the authority for the detention of the patient continues irrespective of the provisions relating to duration, renewal and expiration (see ss 20, 21 (as substituted); and PARAS 518-521 ante), and he may not be discharged, transferred to another hospital or granted leave of absence without the consent of the Secretary of State; if absent without leave he may be taken into custody and returned to hospital at any time without limitation of period (see s 41(3)). An application may be made by the patient or his nearest relative to a mental health review tribunal: see s 70 (as amended); and PARA 564 post.

5 I.e. the persons described in *ibid* s 48(2)(a) (prospectively amended) (which applies to persons detained in prison or in a remand centre and not serving a prison sentence) and s 48(2)(b) (which applies to persons remanded in custody by magistrates' courts).

6 As to the Court of Appeal see COURTS vol 10 (Reissue) PARA 634 et seq.

7 I.e. an appeal under the Criminal Appeal Act 1968 s 15 (as amended) against a determination under the Criminal Procedure (Insanity) Act 1964 s 4 (as substituted and amended) (see PARA 499 ante): see the Criminal Appeal Act 1968 s 16(3), Sch 3 para 2 (s 16(3) substituted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 7, Sch 3 para 3; and amended by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 21; and the Criminal Appeal Act 1968 Sch 3 para 2 substituted by the Mental Health Act 1983 s 148(1), Sch 4 para 23(n)). This applies the Mental Health Act 1983 Pt III (ss 35-55) (as amended) to such person as if he had been ordered to be kept in custody pending trial and were detained in pursuance of a transfer direction together with a restriction direction. See also CRIMINAL LAW, EVIDENCE AND PROCEDURE.

8 Mental Health Act 1983 s 49(1). 'Restriction direction' has the meaning given by s 49: s 145(1). While a person is subject to a restriction direction, the responsible medical officer must make a regular report on him: s 49(3). See PARA 501 ante.

The policy is to impose a restriction direction unless it is proposed to transfer the prisoner within days of the release date and the nature of the offence raises no issue regarding the protection of the public from serious harm: see *R (on the application of T) v Secretary of State for the Home Department* [2003] EWHC 538 (Admin).

As to 'technical lifers' and the possible violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 5(4) see *Benjamin v United Kingdom* (2002) 36 EHRR 1, ECtHR; *R (on the application of D) v Secretary of State for the Home Department*

[2002] EWHC 2805 (Admin), [2003] 1 WLR 1315; *R (on the application of R) v Shetty and Secretary of State for the Home Department* [2003] EWHC 3152 (Admin), [2003] All ER (D) 243 (Dec); and see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 127, 132. 'Technical lifers' are those sentenced to life imprisonment (discretionary or mandatory) and treated as though originally made subject to the Mental Health Act 1983 s 37 (as amended) (see PARA 491 ante) and s 41 (as amended) (see PARA 496 ante) by the court on transfer to hospital; this is a desirable status for such a prisoner because he cannot be returned to prison, becomes entitled to access to mental health review tribunals under the Convention for the Protection of Human Rights and Fundamental Freedoms art 5(4) even before his tariff has expired and is entitled to be discharged if the tribunal so recommends (see PARA 570 post).

9 Mental Health Act 1983 s 49(2). Consequently the Secretary of State, if satisfied that a restriction direction is no longer required for the protection of the public from serious harm, may direct that the patient is to cease to be subject to the restrictions which it imposed: see s 42(1); and PARA 501 ante. A restriction direction in the case of a person serving a sentence of imprisonment ceases to have effect, if it has not previously done so, on his release date: s 50(2) (substituted by the Criminal Justice Act 2003 s 294(1), (3)). When a restriction direction ceases to have effect while the relevant transfer direction continues in force, the patient must be treated as if he had been admitted to hospital in pursuance of a hospital order made on the date when the restriction direction ceased to have effect (see the Mental Health Act 1983 s 41(5); and PARA 497 ante), and the general provisions relating to compulsory admission will apply to him from that time, subject to exceptions and modifications (see PARA 487 ante).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(12) TRANSFER AND REMOVAL OF PRISONERS TO HOSPITAL/538. Further provisions as to transferred prisoners under sentence.

538. Further provisions as to transferred prisoners under sentence.

Where a transfer direction¹ and a restriction direction² have been given in respect of a person serving a sentence of imprisonment³ and before his release date⁴ the Secretary of State⁵ is notified by a responsible medical officer⁶ or any other registered medical practitioner⁷ or a mental health review tribunal⁸ that that person no longer requires treatment for mental disorder or that no effective treatment for his disorder can be given in the hospital⁹ to which he has been removed¹⁰, the Secretary of State may: (1) by warrant direct that he be remitted to any prison or other institution in which he might have been detained if he had not been removed to hospital, there to be dealt with as if he had not been so removed¹¹; or (2) exercise any power of releasing him on licence or discharging him under supervision¹² which would have been exercisable if he had been remitted to such a prison or institution¹³. In such an event, on the arrival of the person concerned in the prison or other institution or, as the case may be, on his release on licence or discharge under supervision, the transfer direction and the restriction direction cease to have effect¹⁴.

A restriction direction in the case of a person serving a sentence of imprisonment ceases to have effect, if it has not previously done so, on his release date¹⁵.

1 As to transfer directions see PARA 535 et seq ante.

2 As to restriction directions see PARA 537 ante.

3 As to persons serving a sentence of imprisonment see PARA 535 note 1 ante.

4 For these purposes, references to a person's release date are references to the day (if any) on which he would be entitled to be released (whether unconditionally or on licence) from any prison or other institution in which he might have been detained if the transfer direction had not been given; and in determining that day there is to be disregarded: (1) any powers that would be exercisable by the Parole Board if he were detained in such a prison or other institution; and (2) any practice of the Secretary of State in relation to the early release under discretionary powers of persons detained in such a prison or other institution: Mental Health Act 1983 s 50(3) (substituted by the Criminal Justice Act 2003 s 294(1), (3)). As to the Parole Board see PRISONS vol 36(2) (Reissue) PARA 615 et seq.

For the purposes of the Prison Act 1952 s 49(2) (as amended) (which provides for discounting from the sentences of certain prisoners periods while they are unlawfully at large: see PRISONS vol 36(2) (Reissue) PARAS 540, 617), a patient who, having been transferred in pursuance of a transfer direction from any such institution as is referred to in that provision, is at large in circumstances in which he is liable to be taken into custody under any provision of the Mental Health Act 1983, is to be treated as unlawfully at large and absent from that institution: s 50(4). For the meaning of 'patient' see PARA 435 ante.

The provisions of s 50(1)-(4) (as amended) have effect as if references in s 50(3)-(4) (s 50(3) as substituted) to a transfer direction included references to a hospital direction: s 50(5)(c) (s 50(5) added by the Crime (Sentences) Act 1997 s 55, Sch 4 para 12(5)).

5 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

6 For the meaning of 'responsible medical officer' see PARA 506 note 1 ante.

7 For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.

8 As to mental health review tribunals see PARA 560 et seq post.

9 For the meaning of 'hospital' see PARA 417 ante.

10 Mental Health Act 1983 s 50(1) (amended by the Criminal Justice Act 2003 s 294(1), (2)).

The provisions of the Mental Health Act 1983 s 50(1)-(4) (as amended) have effect as if the reference in s 50(1) (as amended) to a transfer direction and a restriction direction having been given in respect of a person serving a sentence of imprisonment included a reference to a hospital direction and a limitation direction having been given in respect of a person sentenced to imprisonment: see s 50(5)(a) (as added: see note 4 supra). As to hospital and limitation directions see ss 45A, 45B (as added and amended); and PARA 490 ante.

When considering whether to notify the Secretary of State that a prisoner who has been removed to a hospital is not treatable, the responsible medical officer must take an overall view and is not necessarily under a duty to disclose dissenting views: *R (on the application of Morley) v Nottinghamshire Health Care NHS Trust* [2002] EWCA Civ 1728, [2003] 1 All ER 784. Any challenge under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq) lies against the Home Secretary, not the responsible medical officer who is exercising clinical judgment: *R (on the application of R) v Shetty and Secretary of State for the Home Department* [2003] EWHC 3022 (Admin), [2003] All ER (D) 165 (Dec).

In the case of a discretionary life sentence or detention during Her Majesty's pleasure and transfer to a hospital, where the tariff has expired there cannot be a reference of the case to the Parole Board: the matter is governed by the Mental Health Act 1983; but if hospital treatment is no longer required there can be reference to the Parole Board: see *R v Secretary of State for the Home Department, ex p Hickey* [1995] 1 All ER 479, (1994) 22 BMLR 32, CA. See also *R (on the application of D) v Secretary of State for the Home Department* [2002] EWHC 2805 (Admin), [2003] 1 WLR 1315.

11 Mental Health Act 1983 s 50(1)(a).

12 As to release on licence from prison and discharge under supervision see PRISONS vol 36(2) (Reissue) PARA 612 et seq.

13 Mental Health Act 1983 s 50(1)(b). A life prisoner who becomes a mental patient while under detention is not entitled to seek a recommendation of the Parole Board while he is in hospital: *R v Secretary of State for the Home Department, ex p T* (1994) Times, 29 July, CA. The use of a policy under the Mental Health Act 1983 s 50(1)(b) is not unlawful: *R v Secretary of State for the Home Department, ex p S* (1992) Times 19 August.

14 Mental Health Act 1983 s 50(1).

15 Ibid s 50(2) (substituted by the Criminal Justice Act 2003 s 294(1), (3)). The provisions of the Mental Health Act 1983 s 50(1)-(4) (as amended) have effect as if the reference in s 50(2) (as substituted) to a restriction direction included a reference to a limitation direction: s 50(5)(b) (as added: see note 4 supra). As to the release date see note 4 supra.

A restriction order only ceases to have effect at the end of the period specified by the court in the order or, if made without limit of time, when determined by the Secretary of State: see ss 41, 42 (as amended); and PARAS 496-497 ante.

UPDATE

538 Further provisions as to transferred prisoners under sentence

NOTES 10-14--Mental Health Act 1983 s 50(1) further amended: Mental Health Act 1983 s 11(2).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(12) TRANSFER AND REMOVAL OF PRISONERS TO HOSPITAL/539. Expiry of transfer direction in case of person committed in custody for trial or sentence.

539. Expiry of transfer direction in case of person committed in custody for trial or sentence.

Any transfer direction¹ given in respect of any mentally ill or severely mentally impaired² person detained in a prison or a remand centre, not being a person serving a sentence of imprisonment³, ceases to have effect when his case is disposed of by the court having jurisdiction to try or otherwise deal with him; but without prejudice to any power of that court to make a hospital order⁴ or other order⁵ under Part III of the Mental Health Act 1983⁶ in his case⁷.

Where a transfer direction has been given in respect of such a person ('the detainee'⁸), then if the Secretary of State⁹ is notified by the responsible medical officer¹⁰ or any other registered medical practitioner¹¹ or a mental health review tribunal¹², at any time before the detainee's case is disposed of, that he no longer requires treatment in hospital¹³ for mental disorder¹⁴ or that no effective treatment for his disorder can be given at the hospital to which he has been removed, the Secretary of State may by warrant direct that he be remitted to any place where he might have been detained if he had not been removed to hospital, there to be dealt with as if he had not been so removed¹⁵. If, no such direction having been given, the court is satisfied, on the written or oral evidence of the responsible medical officer, that that detainee no longer requires treatment in hospital for mental disorder, or that no effective treatment for his disorder can be given at the hospital to which he has been removed, the court may order him to be remitted to any such place as is mentioned above¹⁶, or released on bail¹⁷. On his arrival at such place, or on his release on bail, the transfer direction ceases to have effect¹⁸.

If, however, in a case where the Secretary of State has not given a direction for remission, it appears to that court that it is impracticable or inappropriate¹⁹ to bring the detainee in question before the court, the court may, subject to the following conditions, make a hospital order (with or without a restriction order) in his absence; and, in the case of a detainee awaiting trial, may do so without convicting him²⁰. Before making such an order, the court must be satisfied on the oral or written evidence of at least two registered medical practitioners²¹ that the detainee in question is suffering from mental illness or severe mental impairment²² of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment²³; it must also be of the opinion, after considering any depositions or other documents required to be sent to the proper officer of the court, that it is proper to make the order²⁴.

1 As to transfer directions see PARA 535 et seq ante.

2 For the meanings of these terms see PARAS 402-403 ante.

3 I.e. the persons described in the Mental Health Act 1983 s 48(2)(a) (prospectively amended) (see PARA 536 ante): s 51(1). The provisions of s 51 (as amended) also apply to persons remanded in custody by a magistrates' court who are sent in custody to the Crown Court for trial or to be otherwise dealt with while a transfer direction is still in effect in their case: see s 52(2), (5), (6) (amended and prospectively amended); and PARA 540 post.

4 As to hospital orders see PARA 491 ante.

5 I.e. an interim hospital order (see PARA 491 ante), a guardianship order (see PARA 502 ante) or, in conjunction with a hospital order, a restriction order (see PARA 496 ante). As to hospital and limitation directions see PARA 490 ante.

6 I.e. the Mental Health Act 1983 Pt III (ss 35-55) (as amended).

7 Ibid s 51(2).

8 Ibid s 51(1).

9 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

10 For the meaning of 'responsible medical officer' see PARA 506 note 1 ante. See *R (on the application of R) v Shetty and Secretary of State for the Home Department* [2003] EWHC 3022 (Admin), [2003] All ER (D) 165 (Dec).

11 For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.

12 As to mental health review tribunals see PARA 560 et seq post.

13 For the meaning of 'hospital' see PARA 417 ante.

14 For the meaning of 'mental disorder' see PARA 402 ante.

15 Mental Health Act 1983 s 51(3).

16 In any such place as is mentioned in ibid s 51(3).

17 Ibid s 51(4) (amended by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 51). Such release is subject to the Criminal Justice and Public Order Act 1994 s 25 (as amended) (no bail for defendants charged with or convicted of homicide or rape after previous convictions for such offences: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1170).

18 See the Mental Health Act 1983 s 51(3), (4) (s 51(4) as amended: see note 17 supra).

19 The word 'inappropriate' is to be restrictively construed and the provision should not be used as a way of avoiding a potentially troublesome trial: *R (on the application of Kenneally) v Snaresbrook Crown Court, R (on the application of Kenneally) v Rampton Health Authority* [2001] EWHC 968 (Admin), [2002] QB 1169.

20 Mental Health Act 1983 s 51(5). The court should exercise its power under s 51(5) to make a hospital order without first convicting a detainee only in exceptional circumstances: *R (on the application of Kenneally) v Snaresbrook Crown Court, R (on the application of Kenneally) v Rampton Health Authority* [2001] EWHC 968 (Admin), [2002] QB 1169. Once the trial has commenced, mental fitness must be determined under the Criminal Procedure (Insanity) Act 1964 s 4 (as substituted and amended) (see PARA 499 ante; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARAS 1265, 1485): see *R v Griffiths* [2002] EWCA Crim 1762.

21 One of the two medical practitioners must have been approved by the Secretary of State as having special experience in the diagnosis or treatment of mental disorders: see the Mental Health Act 1983 ss 12, 54(1) (as amended); and PARAS 482, 492 ante.

22 See note 2 supra.

23 As to the meaning of 'medical treatment' see PARA 552 post; and as to the treatment which may be given in hospital see PARAS 551, 553-558 post.

24 Mental Health Act 1983 s 51(6). The provisions of s 51(5), (6) apply also to a person who is admitted to a hospital in pursuance of an order under s 44 after being committed under s 43 (as amended; prospectively amended) (see PARA 498 ante) to the Crown Court for a restriction order, as if he were a person subject to a transfer direction: s 51(7).

UPDATE

539 Expiry of transfer direction in case of person committed in custody for trial or sentence

NOTES 15-18--Mental Health Act 1983 s 51(3), (4) amended: Mental Health Act 2007 s 11(3).

TEXT AND NOTES 21-24--Reference to mental illness or severe mental impairment is now to mental disorder; the court must also be satisfied that appropriate medical treatment

(see PARA 461) is available for the person: Mental Health Act 1983 s 51(6) (amended by Mental Health Act 2007 s 5(4), Sch 1 para 12).

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540. Expiry of transfer direction in case of person remanded in custody by magistrates' court.

A transfer direction¹ given in respect of a mentally ill or severely mentally impaired person² remanded in custody by a magistrates' court ('the accused')³ ceases to have effect on the expiration of the period of remand⁴ unless, on being brought before the magistrates' court, he is committed in custody for trial at the Crown Court⁵. However, if the magistrates' court is satisfied, on the written or oral evidence of the responsible medical officer⁶, that the accused no longer requires treatment in hospital for mental disorder or that no effective treatment can be given in the hospital to which he has been removed, it may direct that the transfer direction is to cease to have effect notwithstanding that the period of remand has not expired or the accused has been committed to the Crown Court⁷.

The magistrates' court may, in the absence of the accused, send him to the Crown Court for trial⁸ if the court is satisfied, on the written or oral evidence of the responsible medical officer, that the accused is unfit to take part in the proceedings and the accused is represented by counsel or a solicitor⁹.

1 As to transfer directions see PARA 535 et seq ante.

2 For the meanings of these terms see PARAS 402-403 ante.

3 I.e a person described in the Mental Health Act 1983 s 48(2)(b) (see PARA 536 ante); s 52(1). As to remand by a magistrates' court see MAGISTRATES vol 29(2) (Reissue) PARA 712 et seq.

4 Where a transfer direction has been given in respect of a person so remanded, the power of further remanding him under the Magistrates' Courts Act 1980 s 128 (as amended; prospectively amended) (see MAGISTRATES vol 29(2) (Reissue) PARAS 716-717) may be exercised by the court without his being brought before the court; and, if the court further remands such a person in custody, the period of remand is to be deemed for these purposes not to have expired: Mental Health Act 1983 s 52(3). Notice in writing of any further remand must be given by the designated officer to the managers (see PARA 439 ante) of the hospital where the person is detained: see the Criminal Procedure Rules 2005, SI 2005/384, r 19.20; and MAGISTRATES. The magistrates' court must not further remand the person in his absence unless he has appeared before the court within the previous six months: Mental Health Act 1983 s 52(4).

5 Ibid s 52(2). Where he is so committed for trial, the transfer direction given in his case is treated as if it were a direction given in respect of a person falling within s 51 (as amended) (see PARA 539 ante): s 52(6); and see PARA 539 ante.

As from a day to be appointed, the provisions of s 52(2), (5), (6) are amended so as to refer to a person being 'sent' instead of 'committed': s 52(2), (5), (6) (prospectively amended by the Criminal Justice Act 2003 s 41, Sch 3 Pt 2 para 55(1), (3)(a)-(c)). At the date at which this volume states the law, a day had been appointed only in relation to cases sent for trial under the Crime and Disorder Act 1998 s 51 (as substituted), s 51A(3)(d) (as added). The appointed day for those purposes is 9 May 2005: see the Criminal Justice Act 2003 (Commencement No 9) Order 2005, SI 2005/1267.

6 For the meaning of 'responsible medical officer' see PARA 506 note 1 ante.

7 Mental Health Act 1983 s 52(5). See note 5 supra.

8 I.e under the Crime and Disorder Act 1998 s 51 (as substituted) or s 51A (as added): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1131 et seq.

9 Mental Health Act 1983 s 52(7) (amended by the Criminal Justice Act 2003 ss 41, 332, Sch 3 Pt 2 para 55, Sch 37 Pt 4).

UPDATE

540 Expiry of transfer direction in case of person remanded in custody by magistrates' court

NOTE 4--SI 2005/384 r 19.20 replaced: Criminal Procedure Rules 2010, SI 2010/60, r 19.20.

NOTES 7, 9--Mental Health Act 1983 s 52(5), (7) amended: Mental Health Act 2007 s 11(4).

TEXT AND NOTE 9--Reference to counsel or solicitor now to an authorised person: Mental Health Act 1983 s 52(7) (amended by Legal Services Act 2007 Sch 21 para 57).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(12) TRANSFER AND REMOVAL OF PRISONERS TO HOSPITAL/541. Expiry of transfer direction in case of civil prisoner.

541. Expiry of transfer direction in case of civil prisoner.

Any transfer direction¹ given in respect of a civil prisoner² ceases to have effect on the expiration of the period during which he would, but for his removal to hospital³, be liable to be detained in the place from which he was removed⁴.

Where a transfer direction and a restriction direction⁵ have been given in respect of any such person then, if the Secretary of State⁶ is notified by the responsible medical officer⁷, any other medical practitioner or a mental health review tribunal⁸ at any time before the expiration of the period that: (1) that person no longer requires treatment in hospital for mental disorder⁹; or (2) that no effective treatment for his disorder can be given in the hospital to which he has been removed¹⁰, the Secretary of State may by warrant direct that he be remitted to any place where he might have been detained if he had not been removed to hospital and, on his arrival at such a place, the directions cease to have effect¹¹.

1 As to transfer directions see PARA 535 et seq ante.

2 I.e a person described in the Mental Health Act 1983 s 48(2)(c) or (d) (as amended) (see PARA 536 ante): s 53(1).

3 For the meaning of 'hospital' see PARA 417 ante.

4 Mental Health Act 1983 s 53(1).

5 As to restriction directions see PARA 537 ante.

6 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

7 For the meaning of 'responsible medical officer' see PARA 506 note 1 ante.

8 As to mental health review tribunals see PARA 560 et seq post.

9 Mental Health Act 1983 s 53(2)(a). For the meaning of 'mental disorder' see PARA 402 ante.

10 Ibid s 53(2)(b).

11 Ibid s 53(2).

UPDATE

541 Expiry of transfer direction in case of civil prisoner

NOTES 9-11--Mental Health Act 1983 s 53(2) amended: Mental Health Act 2007 s 11(5).

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(13) TRANSFER WITHIN UNITED KINGDOM, ETC

542. Removal of patients from England and Wales to Scotland.

If it appears to the Secretary of State¹, in the case of a patient² who is for the time being liable to be detained or subject to guardianship³, that it is in the interests of the patient to remove him to Scotland, and that arrangements have been made for admitting him to hospital⁴ or, as the case may be, for receiving him into guardianship there, or, where he is not to be admitted to a hospital, for his detention in hospital to be authorised⁵, the Secretary of State may authorise his removal to Scotland and may give any necessary directions for his conveyance to his destination⁶.

If it appears to the Secretary of State, in the case of a patient who is subject to a restriction order⁷ and has been conditionally discharged⁸, that a transfer⁹ would be in the interests of the patient, the Secretary of State may, with the consent of the minister exercising corresponding functions in Scotland, transfer responsibility for the patient to that minister¹⁰.

1 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

2 For the meaning of 'patient' see PARA 435 ante.

3 I.e. under the Mental Health Act 1983, but otherwise than by virtue of s 35 (remand to hospital for report: see PARA 489 ante), s 36 (remand to hospital for treatment: see PARA 489 ante), or s 38 (as amended) (interim hospital order: see PARA 491 ante): s 80(1). Section 80 (as amended) extends to Scotland: see s 146 (prospectively amended); and PARA 405 ante.

4 For these purposes, 'hospital' has the same meaning as in the Mental Health (Care and Treatment) (Scotland) Act 2003: Mental Health Act 1983 s 80(7) (amended by the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 15, Sch 1 para 2(1), (4)(b); and the Mental Health (Care and Treatment) (Scotland) Act 2003 (Modification of Enactments) Order 2005, SSI 2005/465, art 2, Sch 1 para 13).

5 I.e. authorised by virtue of the Mental Health (Care and Treatment) (Scotland) Act 2003 or the Criminal Procedure (Scotland) Act 1995. Reference in the Mental Health Act 1983 s 80 (as amended) to a patient's detention in hospital being authorised by virtue of the Mental Health (Care and Treatment) (Scotland) Act 2003 or the Criminal Procedure (Scotland) Act 1995 are to be read as including references to a patient in respect of whom a certificate under one of the provisions listed in the Mental Health (Care and Treatment) (Scotland) Act 2003 s 290(7)(a) is in operation: Mental Health Act 1983 s 80(8) (added by the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), Sch 1 para 2(1), (4) (c)).

6 Mental Health Act 1983 s 80(1) (amended by the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 16, Sch 1 para 2(1), (4)(a), Sch 3; and the Mental Health (Care and Treatment) (Scotland) Act 2003 (Modification of Enactments) Order 2005, SSI 2005/465, art 3, Sch 2). The Mental Health Act 1983 s 80 (as amended), s 80A (as added and amended) have effect as if any hospital direction under s 45A (as added and amended) (see PARA 490 ante) were a transfer direction under s 47 (as amended) (see PARA 535 ante), and as if any limitation direction under s 45A (as added and amended) were a restriction direction under s 49 (see PARA 537 ante): s 92(4) (added by the Crime (Sentences) Act 1997 s 55, Sch 4 para 12(16)).

7 I.e. under the Mental Health Act 1983 s 41 (as amended): see PARA 496 ante.

8 I.e. under *ibid* s 42 (see PARA 524 ante) or s 73 (as substituted) (see PARA 570 post).

9 I.e. under *ibid* s 80A (as added and amended).

10 Ibid s 80A(1) (s 80A added by the Crime (Sentences) Act 1997 s 48, Sch 3 para 1; and amended by the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), Sch 3; and the Mental Health (Care and Treatment) (Scotland) Act 2003 (Modification of Enactments) Order 2005, SSI 2005/465, Sch 2).

UPDATE

542 Removal of patients from England and Wales to Scotland

TEXT AND NOTES--See also Mental Health Act 1983 s 80ZA (added by Mental Health Act 2007 Sch 5 para 3) (transfer of responsibility for community patients to Scotland).

NOTE 6--Mental Health Act 1983 s 80(1) further amended: Mental Health Act 2007 Sch 5 para 2.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(13) TRANSFER WITHIN UNITED KINGDOM, ETC/543. Removal to England and Wales of hospital patients from Scotland.

543. Removal to England and Wales of hospital patients from Scotland.

Where a patient whose detention in hospital was authorised by virtue of the Mental Health (Care and Treatment) (Scotland) Act 2003 or the Criminal Procedure (Scotland) Act 1995¹ is admitted to a hospital² in England and Wales, such patient must be treated³:

- 71 (1) as if on the date of his admission he had been so admitted in pursuance of an application made, or an order or direction made or given, on that date under the enactment in force in England and Wales which most closely corresponds to the enactment to which he was subject immediately before his removal⁴; and
- 72 (2) where he is subject to a measure under any enactment in force in Scotland restricting his discharge, as if he were subject to an order or direction under the enactment in force in England and Wales which most closely corresponds to the enactment restricting his discharge to which he was subject immediately before his removal⁵.

Where the patient⁶ was immediately before his removal liable to be detained under the Mental Health (Care and Treatment) (Scotland) Act 2003 by virtue of a transfer for treatment direction⁷ given while he was serving a sentence of imprisonment⁸ imposed by a court in Scotland, he must be treated as if the sentence had been imposed by a court in England and Wales⁹.

Where the patient¹⁰ was immediately before his removal subject to a hospital direction¹¹ or transfer for treatment direction, the restriction direction¹² or limitation direction¹³ under the Mental Health Act 1983 to which he is subject by virtue of heads (1) and (2) above expires on the date on which one of the two first-mentioned directions would have expired if he had not been so removed¹⁴.

Where the patient¹⁵ was immediately before his removal liable to be detained under the Mental Health (Care and Treatment) (Scotland) Act 2003 by virtue of a hospital direction, he must be treated as if any sentence of imprisonment passed at the time at which the hospital direction was made had been imposed by a court in England and Wales¹⁶.

1 Where a patient whose detention in hospital was authorised by virtue of the Mental Health (Care and Treatment) (Scotland) Act 2003 or the Criminal Procedure (Scotland) Act 1995 immediately before the removal of the patient to England and Wales under regulations made under the Mental Health (Care and Treatment) (Scotland) Act 2003 s 290 (cross-border transfer patients: patients subject to detention requirement or otherwise in hospital): Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 2(1). Any directions given under regulations made under the Mental Health (Care and Treatment) (Scotland) Act 2003 s 290 as to removal of the patient to a hospital in England and Wales have effect as if they had been given under the Mental Health Act 1983: Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 2(6). For the meaning of 'England' see PARA 405 note 6 ante. For the meaning of 'Wales' see PARA 405 note 7 ante.

2 For the purposes of ibid art 2, references to a hospital in England and Wales are to be construed as references to a hospital within the meaning of the Mental Health Act 1983 Pt II (ss 2-34) (as amended) (see PARA 417 ante): Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 2(7).

3 A patient removed to England and Wales under the Mental Health Act 1983 Pt VI (ss 80-92) (as amended), the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), and regulations made under the Mental Health (Care and Treatment) (Scotland) Act 2003 s 290 must be treated for the purposes of the Mental Health Act 1983 as suffering from such form of mental

disorder (see PARA 402 ante) as may be recorded (after removal or cessation of restriction on discharge) in his case; and references in the Mental Health Act 1983 to the form or forms of mental disorder specified in the relevant application, order or direction must be construed as including references to the form of mental disorder so recorded: see s 92(3) (amended by the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 15, Sch 1 para 2(1), (8)). As to the patient's right to apply to a mental health review tribunal see PARAS 564-565 post. The responsible medical officer (see PARA 506 note 1 ante) or the nominated medical attendant (see PARA 476 note 3 ante), as the case may be, must record his opinion in the prescribed form as to the form or forms of mental disorder from which the patient is suffering: Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 11, Sch 1 Form 32 (reg 11(1) amended by the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 15, Sch 2 para 1). The opinion must be recorded as soon as reasonably practicable after the patient's removal or, where the patient is or becomes at the time of his removal subject to a restriction order or restriction direction (or is treated as being so subject), as soon as reasonably practicable after he ceases to be so subject: Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 11(2). The managers of the hospital or the guardian, as the case may be, must cause to be recorded in the prescribed form the date on which the patient is admitted to hospital or received into guardianship and as soon as reasonably practicable inform the patient's nearest relative, if any, of the admission: reg 11(3), (4)(a), (b), Sch 1 Form 33. Where the patient is received into the guardianship of a person other than the local social services authority, the guardian must notify the responsible local social services authority of the date recorded under reg 11(4)(a), and also the particulars required to be notified to such authority by regs 12(b), (e) (see PARA 476 ante): reg 11(4)(c). For the meaning of 'managers' see PARA 439 ante; as to the guardian and guardianship see PARA 469 et seq ante; for the meaning of 'local social services authority' see PARA 424 ante; and for the meaning of 'responsible local social services authority' see PARA 475 note 1 ante.

4 Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 2(2)(a).

5 Ibid art 2(2)(b).

6 Ie the patient to whom ibid art 2 applies: see note 1 supra.

7 'Transfer for treatment direction' has the meaning given by the Mental Health (Care and Treatment) (Scotland) Act 2003 s 136: Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 1(3).

8 Ie within the meaning of the Mental Health (Care and Treatment) (Scotland) Act 2003 s 136(9).

9 Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 2(3).

10 See note 6 supra.

11 'Hospital direction' means a direction made under the Criminal Procedure (Scotland) Act 1995 s 59A (as added): Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 1(3).

12 For the meaning of 'restriction direction' see PARA 537 note 8 ante.

13 For the meaning of 'limitation direction' see PARA 490 note 9 ante.

14 Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 2(4).

15 See note 6 supra.

16 Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 2(5).

UPDATE

543 Removal to England and Wales of hospital patients from Scotland

TEXT AND NOTES--See also Mental Health Act 1983 ss 80B (removal of detained patients from Scotland), 80C (removal of patients subject to compulsion in the community from

Scotland), 80D (transfer of conditionally discharged patients from Scotland) (ss 80B-80D added by Mental Health Act 2007 Sch 5 para 4).

TEXT AND NOTES 1, 2--Transfer of patient who is subject to lawful hospital order does not permit challenge to the continuing effect of hospital order on Convention grounds: *R (on the application of Juncal) v Secretary of State for the Home Department* [2008] EWCA Civ 869, [2008] All ER (D) 340 (Jul).

NOTE 3--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

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544. Removal of patients to Northern Ireland.

If it appears to the Secretary of State¹, in the case of a patient² who is for the time being liable to be detained or subject to guardianship³, that it is in the patient's interest to remove him to Northern Ireland and that arrangements have been made for admitting him to a hospital⁴ or for receiving him into guardianship there, the Secretary of State may authorise the removal of the patient to Northern Ireland and give any necessary directions for his conveyance to his destination⁵.

Where such a patient is liable to be detained by virtue of an application, order or direction under any enactment in force in England and Wales⁶, he must, on admission to a hospital in Northern Ireland, be treated as if, on the date of his admission, he had been so admitted in pursuance of an application made, or an order or direction made or given, on that date under the corresponding enactment in force in Northern Ireland, and, where he is subject to a restriction order or a restriction direction, as if he were subject to a restriction order or a restriction direction under the corresponding enactment in force in Northern Ireland⁷.

Where such a patient is subject to guardianship by virtue of an application, order or direction under any enactment in force in England and Wales, he must be treated as if, on the date on which he arrives at the place where he is to reside, he had been received into guardianship in pursuance of an application, order or direction under the corresponding enactment in force in Northern Ireland, accepted, made or given on that date⁸.

Where a person so removed was immediately before his removal liable to be detained by virtue of an application for admission for assessment under the Mental Health Act 1983⁹, he must be treated, on admission to a hospital in Northern Ireland, as if he had been admitted in pursuance of an application for admission for assessment under the Mental Health (Northern Ireland) Order 1986¹⁰ made on the date of his admission¹¹.

Where a person so removed was immediately before his removal liable to be detained by virtue of an application for admission for treatment¹², he must be treated, on admission to a hospital in Northern Ireland, as if he were detained for treatment¹³ by virtue of a report¹⁴ made on the date of his admission¹⁵.

Where a person so removed was immediately before his removal liable to be detained by virtue of a transfer direction¹⁶ given while he was serving a sentence of imprisonment¹⁷ imposed by a court in England and Wales, he must be treated as if the sentence had been imposed by a court in Northern Ireland¹⁸.

If it appears to the Secretary of State, in the case of a patient who is subject to a restriction order or restriction direction¹⁹ and has been conditionally discharged²⁰, that a transfer²¹ would be in the interests of the patient, the Secretary of State may, with the consent of the minister exercising corresponding functions in Northern Ireland, transfer responsibility for the patient to that minister²². Where responsibility for such a patient is so transferred, the patient must be treated as if on the date of the transfer he had been conditionally discharged under the corresponding enactment in force in Northern Ireland, and as if he were subject to a restriction order or restriction direction under the corresponding enactment in force in Northern Ireland²³. Where a patient responsibility for whom is so transferred was immediately before the transfer subject to a restriction order or restriction direction of limited duration, the restriction order or restriction direction to which he is subject²⁴ expires on the date on which the first-mentioned order or direction would have expired if the transfer had not been made²⁵.

1 As to the Secretary of State see PARA 542 note 1 ante.

2 For the meaning of 'patient' see PARA 435 ante.

3 Ie under the Mental Health Act 1983, otherwise than by virtue of s 35, s 36 or s 38 (as amended) (see PARA 542 note 3 ante): s 81(1).

The Mental Health Act 1983 s 81 (as amended), s 81A (as added) have effect as if any hospital direction under s 45A (as added) (see PARA 490 ante) were a transfer direction under s 47 (as amended) (see PARA 535 ante), and as if any limitation direction under s 45A (as added) were a restriction direction under s 49 (see PARA 537 ante): s 92(4) (added by the Crime (Sentences) Act 1997 s 55, Sch 4 para 12(16)).

4 For these purposes, 'hospital' has the same meaning as in the Mental Health (Northern Ireland) Order 1986, SI 1986/595 (NI 4) (as amended): Mental Health Act 1983 s 81(8) (s 81(2), (4), (5), (7), (8) amended by the Mental Health (Northern Ireland Consequential Amendments) Order 1986, SI 1986/596, art 2).

5 Mental Health Act 1983 s 81(1). The authority under which the patient was detained or subject to guardianship ceases to have effect on his reception into a hospital or into guardianship in Northern Ireland: s 91(1).

6 For the meaning of 'England' see PARA 405 note 6 ante. For the meaning of 'Wales' see PARA 405 note 7 ante.

7 Mental Health Act 1983 s 81(2) (as amended: see note 4 supra). Where a person so removed was subject to a restriction order or restriction direction of limited duration, the restriction order or restriction direction expires on the date on which it would have expired if he had not been so removed: s 81(7) (as so amended). As to restriction orders see PARA 496 ante; and as to restriction directions see PARA 537 ante.

8 Ibid s 81(3).

9 Ie under ibid s 2(1): see PARA 460 ante.

10 Ie under the Mental Health (Northern Ireland) Order 1986, SI 1986/595 (NI 4), art 4.

11 Mental Health Act 1983 s 81(4) (as amended: see note 4 supra).

12 Ie under ibid s 3(1): see PARA 461 ante.

13 Ie under the Mental Health (Northern Ireland) Order 1986, SI 1986/595 (NI 4), Pt II, (arts 4-41) (as amended).

14 Ie under ibid art 12(1) (as amended).

15 Mental Health Act 1983 s 81(5) (as amended: see note 4 supra).

16 As to transfer directions see PARA 535 ante.

17 Ie a sentence of imprisonment within the meaning of the Mental Health Act 1983 s 47(5) (as amended) (see PARA 535 note 1 ante).

18 Ibid s 81(6). Section 81(6) has effect as if any reference to a transfer direction given while a patient was serving a sentence of imprisonment imposed by a court included a reference to a hospital direction given by a court after imposing a sentence of imprisonment on a patient: s 92(5) (added by the Crime (Sentences) Act 1997 Sch 4 para 12(16)).

19 Ie under the Mental Health Act 1983 s 41 (as amended) (see PARA 496 ante) or s 49 (see PARA 537 ante).

20 Ie under ibid s 42 (see PARA 524 ante) or s 73 (as substituted) (see PARA 570 post).

21 Ie under ibid s 81A (as added).

22 Ibid s 81A(1) (s 81A added by the Crime (Sentences) Act 1997 s 48, Sch 3 para 2). See note 3 supra.

23 Mental Health Act 1983 s 81A(2) (as added: see note 22 supra). See note 3 supra.

24 Ie by virtue of s 81A(2) (as added) (see the text and note 23 supra).

25 Ibid s 81A(3) (as added: see note 22 supra). See note 3 supra.

UPDATE

544 Removal of patients to Northern Ireland

TEXT AND NOTES--See also Mental Health Act 1983 s 81ZA (added by Mental Health Act 2007 Sch 5 para 6) (removal of community patients to Northern Ireland).

NOTE 5--See also Mental Health Act 1983 s 91(2A) (added by Mental Health Act 2007 Sch 5 para 16).

TEXT AND NOTE 7--Mental Health Act 1983 s 81(2) further amended: Mental Health Act 2007 Sch 5 para 5.

NOTE 7--1983 Act s 81(7) further amended: Mental Health Act 2007 s 40(4), Sch 11 Pt 8. For effect see s 40(7).

TEXT AND NOTES 22-25--1983 Act s 81A(1)-(3) amended: Mental Health Act 2007 s 40(5), Sch 5 para 7, Sch 11 Pt 8. For effect see s 40(7).

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545. Removal of patients to England and Wales from Northern Ireland.

If it appears to the responsible authority¹, in the case of a patient² who is liable to be detained or subject to guardianship under the Mental Health (Northern Ireland) Order 1986³, that it is in the patient's interests to remove him to England and Wales⁴, and that arrangements have been made for admitting him to a hospital⁵ or for receiving him into guardianship there, the responsible authority may authorise his removal to England and Wales and may give any necessary directions for his conveyance to his destination⁶.

Where such a patient is liable to be detained by virtue of an application, order or direction under the Mental Health (Northern Ireland) Order 1986, he must, on admission to a hospital in England and Wales, be treated as if on the date of his admission he had been so admitted in pursuance of an application made, or an order or direction made or given, on that date under the corresponding enactment in force in England and Wales⁷. Where such a patient is subject to a restriction order or restriction direction under the Mental Health (Northern Ireland) Order 1986, he must be treated as if he were subject to a restriction order or restriction direction under the corresponding enactment in force in England and Wales⁸.

Where such a patient is subject to guardianship by virtue of an application, order or direction under any enactment in force in Northern Ireland, he must be treated as if, on the date on which he arrives at the place where he is to reside, he had been received into guardianship in pursuance of an application, order or direction under the corresponding enactment in force in England and Wales, accepted, made or given on that date⁹.

Where such a patient was immediately before his removal liable to be detained by virtue of an application for admission for assessment under the Mental Health (Northern Ireland) Order 1986¹⁰, he must be treated on his admission to hospital in England and Wales as if he had been admitted in pursuance of an application for admission for assessment under the Mental Health Act 1983¹¹ made on the date of his admission¹². Where such a patient was immediately before removal liable to be detained for treatment¹³, he must be treated on his admission to a hospital in England and Wales as if he had been admitted in pursuance of an application for admission for treatment¹⁴ made on the date of his admission¹⁵.

Where such a patient was immediately before removal liable to be detained¹⁶ by virtue of a transfer direction given while he was serving a sentence of imprisonment¹⁷ imposed by a court in Northern Ireland, he must be treated as if the sentence had been imposed by a court in England and Wales¹⁸.

If it appears to the relevant minister¹⁹, in the case of a patient who is subject to a restriction order or restriction direction²⁰ and has been conditionally discharged²¹, that a transfer²² would be in the interests of the patient, that minister may, with the consent of the Secretary of State, transfer responsibility for the patient to the Secretary of State²³. Where responsibility for such a patient is so transferred, the patient must be treated as if on the date of the transfer he had been conditionally discharged²⁴ and as if he were subject to a restriction order or restriction direction²⁵. Where a patient responsibility for whom is so transferred was immediately before the transfer subject to a restriction order or restriction direction of limited duration, the restriction order or restriction direction to which he is subject²⁶ expires on the date on which the first-mentioned order or direction would have expired if the transfer had not been made²⁷.

1 As to the responsible authority see the Mental Health Act 1983 s 82(7) (s 82(1)-(3), (5)-(7) amended by the Mental Health (Northern Ireland Consequential Amendments) Order 1986, SI 1986/596, art 2).

The Mental Health Act 1983 s 82 (as amended), s 82A (as added) have effect as if any hospital direction under s 45A (as added) (see PARA 490 ante) were a transfer direction under s 47 (as amended) (see PARA 535 ante), and as if any limitation direction under s 45A (as added) were a restriction direction under s 49 (see PARA 537 ante): s 92(4) (added by the Crime (Sentences) Act 1997 s 55, Sch 4 para 12(16)).

2 For the meaning of 'patient' see PARA 435 ante.

3 Ie otherwise than by virtue of the Mental Health (Northern Ireland) Order 1986, SI 1986/595 (NI 4), art 42, 43 or 45 (as amended) (cf the Mental Health Act 1983 ss 80(1), 81(1); and see PARAS 542 note 3, 544 note 3 ante): s 82(1) (as amended: see note 1 supra).

4 For the meaning of 'England' see PARA 405 note 6 ante. For the meaning of 'Wales' see PARA 405 note 7 ante.

5 Ie a hospital within the meaning of the Mental Health Act 1983 Pt II (ss 2-34) (as amended) (see PARA 417 ante): s 92(1).

6 Ibid s 82(1) (as amended: see note 1 supra). Such a patient must be treated for the purposes of the Mental Health Act 1983 as suffering from such form of mental disorder as may be recorded in his case: see s 92(3) (as amended); and PARA 543 note 3 ante.

7 Ibid s 82(2) (as amended: see note 1 supra). A patient so removed to England and Wales is treated as suffering from such form of mental disorder as may be recorded pursuant to regulations (see PARA 543 ante); and references in the Mental Health Act 1983 to the form or forms of mental disorder specified in the relevant application, order or direction must be construed as including references to the form or forms of mental disorder so recorded: s 92(3). A patient transferred under this provision has a right to apply to a mental health review tribunal: see s 66(1) (as amended), s 69(2)(a) (as amended), s 70 (as amended), s 79(1)(c) (as amended); and PARAS 564-565 post.

8 Ibid s 82(2) (as amended: see note 1 supra). Where a person removed under s 82 (as amended) was immediately before removal subject to a restriction order or restriction direction of limited duration, it expires on the date on which such an order or direction would have expired if he had not been so removed: s 82(6) (as so amended). As to restriction orders see PARA 496 ante; and as to restriction directions see PARA 537 ante.

9 Ibid s 82(3) (as amended: see note 1 supra).

10 Ie under the Mental Health (Northern Ireland) Order 1986, SI 1986/595 (NI 4), art 4.

11 See the Mental Health Act 1983 s 2(1); and PARA 460 ante.

12 Ibid s 82(4A) (added by the Mental Health (Northern Ireland Consequential Amendments) Order 1986, SI 1986/596, art 2).

13 Ie by virtue of a report under the Mental Health (Northern Ireland) Order 1986, SI 1986/595 (NI 4), art 12(1) or art 13 (as amended).

14 See the Mental Health Act 1983 s 3(1); and PARA 461 ante.

15 Ibid s 82(4) (substituted by the Mental Health (Northern Ireland Consequential Amendments) Order 1986, SI 1986/596, art 2).

16 Ie under the Mental Health (Northern Ireland) Order 1986, SI 1986/595 (NI 4) (as amended).

17 Ie within the meaning of ibid art 53(5) (as amended).

18 Mental Health Act 1983 s 82(5) (as amended: see note 1 supra).

19 Ie the minister exercising in Northern Ireland functions corresponding to those of the Secretary of State: see ibid s 82A(4) (s 82A added by the Crime (Sentences) Act 1997 s 48, Sch 3 para 3). See note 1 supra.

20 Ie under the Mental Health (Northern Ireland) Order 1986, SI 1986/595 (NI 4), art 47(1) or art 55.

21 Ie under ibid art 48(2) or art 78(2).

22 Ie under the Mental Health Act 1983 s 82A (as added).

23 Ibid s 82A(1) (as added: see note 19 supra). See note 1 supra.

24 Ie under ibid s 42 (see PARA 524 ante) or s 73 (as substituted) (see PARA 570 post).

25 Ibid s 82A(2) (as added: see note 19 supra). The reference in the text is a reference to restriction orders under s 41 (as amended) (see PARA 496 ante) and restriction directions under s 49 (see PARA 537 ante). See note 1 supra.

26 Ie by virtue of ibid s 82A(2) (as added).

27 Ibid s 82A(3) (as added: see note 19 supra). See note 1 supra.

UPDATE

545 Removal of patients to England and Wales from Northern Ireland

TEXT AND NOTES 7, 8--Mental Health Act 1983 s 82(2) amended: Mental Health Act 2007 Sch 5 para 8.

TEXT AND NOTE 25--Mental Health Act 1983 s 82A(2) amended: Mental Health Act 2007 Sch 5 para 9.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(13) TRANSFER WITHIN UNITED KINGDOM, ETC/546. Removal of patients from the Channel Islands and the Isle of Man to England and Wales.

546. Removal of patients from the Channel Islands and the Isle of Man to England and Wales.

The Secretary of State¹ may by warrant direct that any offender found by a court in any of the Channel Islands or in the Isle of Man to be insane or to have been insane at the time of the alleged offence and ordered to be detained during Her Majesty's pleasure, be removed to a hospital² in England and Wales³. The Secretary of State may by warrant direct that any patient⁴ so removed to England and Wales be returned to the island from which he was so removed, there to be dealt with according to law in all respects as if he had not been so removed⁵.

Where a patient is detained or subject to guardianship in the Channel Islands or the Isle of Man⁶ and removed to England and Wales⁷, that patient is treated as if he had been admitted to hospital or received into guardianship under the provision of the Mental Health Act 1983 corresponding to the Channel Islands or Isle of Man enactment⁸.

Where a patient admitted to hospital in England and Wales is subject to an order or direction restricting his discharge, he is to be treated on admission as if he were subject to a restriction order or restriction direction⁹. Where such a patient was immediately before removal liable to be detained by virtue of a transfer direction given while he was serving a sentence of imprisonment imposed by a court in the island in question he must be treated as if the sentence had been imposed by a court in England and Wales¹⁰.

Any patient responsibility for whom is transferred to the Secretary of State by the authority exercising corresponding functions in any of the Channel Islands or the Isle of Man¹¹, must be treated as if on the date of the transfer he had been conditionally discharged¹² and as if he were subject to a restriction order or restriction direction¹³. Where the patient was immediately before the transfer subject to an order or direction restricting his discharge, being an order or direction of limited duration, the restriction order or restriction direction to which he is subject¹⁴ expires on the date on which the first-mentioned order or direction would have expired if the transfer had not been made¹⁵.

1 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

2 I.e. a hospital within the meaning of the Mental Health Act 1983 Pt II (ss 2-34) (as amended): s 92(1).

3 For the meaning of 'patient' see PARA 435 ante.

4 Mental Health Act 1983 s 84(1). For the meaning of 'England' see PARA 405 note 6 ante. For the meaning of 'Wales' see PARA 405 note 7 ante.

There are no suitable facilities on the islands mentioned for treatment and care of the patients to whom s 84 (as amended) relates, and they are normally transferred to a hospital in England which provides high security psychiatric services. As to such hospitals see PARA 418 ante. A patient so removed must be treated as if he were subject to a hospital order with a restriction order, made without limitation of time (see PARA 499 ante): s 84(2) (amended by the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 para 22).

The Mental Health Act 1983 s 84 (as amended), s 85, s 85A (as added) have effect as if any hospital direction under s 45A (as added) (see PARA 490 ante) were a transfer direction under s 47 (as amended) (see PARA 535 ante), and as if any limitation direction under s 45A (as added) were a restriction direction under s 49 (see PARA 537 ante): s 92(4) (added by the Crime (Sentences) Act 1997 s 55, Sch 4 para 12(16)).

5 Mental Health Act 1983 s 84(3).

6 le under a provision corresponding to an enactment contained in the Mental Health Act 1983 other than s 35, s 36 or s 38 (as amended) (see PARA 542 note 3 ante): s 85(1).

7 le under a provision corresponding to ibid s 83 (see PARA 547 post).

8 Ibid s 85(1)-(3). The patient transferred also has the right to apply to a mental health review tribunal: see PARAS 564-565 post. While being conveyed to hospital or to the place where he is to reside, a patient under guardianship is deemed to be in legal custody (see PARA 446 ante), and s 138 (see PARA 447 ante) applies: s 85(6). See also note 4 supra.

9 Ibid s 85(2). Where he was immediately before removal subject to an order or direction of limited duration restricting his discharge, the restriction order or restriction direction to which he is subject on admission to a hospital in England and Wales expires on the date on which such an order or direction would have expired if he had not been removed: s 85(5). As to restriction orders see PARA 496 ante and as to restriction directions see PARA 537 ante. See note 4 supra.

10 Ibid s 85(4), (7). See note 4 supra.

11 Ibid s 85A(1) (s 85A added by the Crime (Sentences) Act 1997 s 48, Sch 3 para 5). The text refers to the exercise of functions under a provision corresponding to the Mental Health Act 1983 s 83A (as added): see PARA 547 post. See note 4 supra.

12 le under ibid s 42 (see PARA 524 ante) or s 73 (as substituted) (see PARA 570 post).

13 Ibid s 85A(2) (as added: see note 11 supra). As to restriction orders or restriction directions see s 41 (as amended) (see PARA 496 ante) or s 49 (see PARA 537 ante). See note 4 supra.

14 le by virtue of s 85A(2) (as added) (see the text and note 13 supra).

15 Ibid s 85A(3) (as added: see note 11 supra). See note 4 supra.

UPDATE

546 Removal of patients from the Channel Islands and the Isle of Man to England and Wales

TEXT AND NOTES--See also Mental Health Act 1983 s 85ZA (added by Mental Health Act 2007 Sch 5 para 12) (responsibility for community patients transferred from Channel Islands and Isle of Man).

NOTE 4--Mental Health Act 1983 s 84(2) further amended: Mental Health Act 2007 s 40(3)(b), Sch 11 Pt 8. For effect see s 40(7).

TEXT AND NOTE 9--Mental Health Act 1983 s 85(2) amended: Mental Health Act 2007 Sch 5 para 11.

TEXT AND NOTES 13, 15--Mental Health Act 1983 s 85A(2), (3) amended: Mental Health Act 2007 Sch 5 para 13.

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547. Removal of patients to the Channel Islands and the Isle of Man from England and Wales.

If it appears to the Secretary of State¹, in the case of a patient² who is liable to be detained or subject to guardianship³, that it is in the patient's interests to remove him to any of the Channel Islands or the Isle of Man, he may authorise the patient's removal to the island in question and give any necessary directions for his conveyance to his destination; proper arrangements must have been made for admitting him into a hospital or guardianship there⁴.

If it appears to the Secretary of State, in the case of a patient who is subject to a restriction order or restriction direction⁵ and has been conditionally discharged⁶, that a transfer⁷ would be in the interests of the patient, the Secretary of State may, with the consent of the authority exercising corresponding functions in any of the Channel Islands or in the Isle of Man, transfer responsibility for the patient to that authority⁸.

1 As to the Secretary of State see PARA 542 note 1 ante.

2 For the meaning of 'patient' see PARA 435 ante.

3 Ie under the Mental Health Act 1983 otherwise than by virtue of s 35, s 36, or s 38 (as amended) (see PARA 542 note 3 ante): s 83.

The Mental Health Act 1983 s 83, s 83A (as added) have effect as if any hospital direction under s 45A (as added) (see PARA 490 ante) were a transfer direction under s 47 (as amended) (see PARA 535 ante), and as if any limitation direction under s 45A (as added) were a restriction direction under s 49 (see PARA 537 ante): s 92(4) (added by the Crime (Sentences) Act 1997 s 55, Sch 4 para 12(16)).

4 Mental Health Act 1983 s 83.

5 Ie under ibid s 41 (as amended) (see PARA 496 ante) or s 49 (see PARA 537 ante).

6 Ie under ibid s 42 (see PARA 524 ante) or s 73 (as substituted) (see PARA 570 post).

7 Ie under ibid s 83 (as added) (see the text and notes 1-4 supra).

8 Ibid s 83A (added by the Crime (Sentences) Act 1997 s 48, Sch 3 para 4). See note 3 supra.

UPDATE

547 Removal of patients to the Channel Islands and the Isle of Man from England and Wales

TEXT AND NOTES--See also Mental Health Act 1983 s 83ZA (added by Mental Health Act 2007 Sch 5 para 10) (removal or transfer of community patients to Channel Islands or Isle of Man).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(13) TRANSFER WITHIN UNITED KINGDOM, ETC/548. Removal of alien patients.

548. Removal of alien patients.

If it appears to the Secretary of State¹, in the case of any patient² who is neither a British citizen nor a Commonwealth citizen having a right of abode in the United Kingdom³ and who is receiving treatment for mental illness⁴ as an in-patient in a hospital in England and Wales⁵ or in Northern Ireland⁶ and who is detained for treatment⁷, that proper arrangements have been made for the removal of the patient to a country or territory outside the United Kingdom, the Isle of Man and the Channel Islands and for his care and treatment there, the Secretary of State may by warrant authorise the removal of the patient from the place where he is receiving treatment and may give such directions as he thinks fit for the conveyance of the patient to his destination and for his detention in any place or on board any ship or aircraft until his arrival at any specified port or place in any such country or territory⁸. However, such removal may only be authorised if it is in the patient's interests⁹. Further, the Secretary of State's powers in respect of any patient may not be exercised except with the approval of a mental health review tribunal⁹. Where the patient is removed, any restriction order still in force continues to apply to him if he returns to England and Wales¹¹.

1 The Secretary of State decides after appropriate consultation whether authority should be given under the Mental Health Act 1983 s 86 (as amended) or whether the patient should be repatriated under other powers: see the memorandum issued by the Department of Health and Social Security, 'Mental Health Act 1983: Memorandum on Parts I to VI, VIII and X' (1987). See also note 8 infra. As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

2 For the meaning of 'patient' see PARA 435 ante.

3 Ie by virtue of the Immigration Act 1971 s 2(1)(b) (as substituted): see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 14, 22, 85. For the meaning of 'United Kingdom' see PARA 406 note 18 ante.

4 Ie mental illness as distinguished from other forms of mental disorder mentioned in the Mental Health Act 1983 s 1(2): see PARA 402 ante.

5 Ie a hospital within the meaning of the Mental Health Act 1983 Pt II (ss 2-34) (as amended) (see PARA 417 ante); s 92(1). For the meaning of 'England' see PARA 405 note 6 ante; and for the meaning of 'Wales' see PARA 405 note 7 ante.

6 Ie a hospital within the meaning of the Mental Health (Northern Ireland) Order 1986, SI 1986/595 (NI 4) (as amended).

7 Ie pursuant to an application for admission for treatment (under the Mental Health Act 1983 s 3 (see PARA 461 ante)) or a report (under the Mental Health (Northern Ireland) Order 1986, SI 1986/595 (NI 4), art 12(1) or art 13 (as amended)), or a hospital order (under the Mental Health Act 1983 s 37 (as amended) (see PARA 491 ante) or the Mental Health (Northern Ireland) Order 1986, SI 1986/595 (NI 4), art 44 (as amended)), or an order or direction (under the Mental Health Act 1983, other than s 35, s 36, or s 38 (as amended) (see PARAS 489, 491 ante) or the Mental Health (Northern Ireland) Order 1986, SI 1986/595 (NI 4), other than art 42, art 43 or art 45 (as amended)) having the same effect as such a hospital order: Mental Health Act 1983 s 86(1)(a)-(c) (amended by the Mental Health (Northern Ireland Consequential Amendments) Order 1986, SI 1986/596, art 2).

8 Mental Health Act 1983 s 86(1), (2) (as amended: see note 7 supra). Section 86 (as amended) does not override the Secretary of State's power to issue removal directions under the Immigration Act 1971: *R (on the application of X) v Secretary of State for the Home Department* [2001] 1 WLR 740, CA. See also the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 3; *D v United Kingdom* (1997) 24 EHRR 423, ECtHR; *Bensaid v United Kingdom* (2001) 33 EHRR 205, ECtHR; *R v Secretary of State for the Home Department, ex p Turgut* [2001] 1 All ER 719, CA; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 124.

9 Mental Health Act 1983 s 86(2). See *R v Secretary of State for the Home Department, ex p Talmasani* [1987] Imm AR 32, CA, and *R v Immigration Appeal Tribunal and Secretary of State for the Home Department, ex p Alghali* [1986] Imm AR 376, where submissions that the Secretary of State should have proceeded under the Mental Health Act 1983 s 86 (as amended) rather than deporting the patient under the Immigration Act 1971 were rejected. In the former case, however, it was said, obiter, that the result might have been different had the patient been so severely ill that it would have been inhumane to deport him without making arrangements for his care and treatment in the country of destination.

10 Mental Health Act 1983 s 86(3). As to tribunals generally see PARA 560 et seq post. There is, however, no express provision made for the procedure to be followed in such cases by the Mental Health Review Tribunal Rules 1983, SI 1983/942 (as amended): see PARA 576 et seq post.

11 Mental Health Act 1983 s 91(2). Otherwise, the application, order or direction by virtue of which he is liable to be detained ceases to have effect when he is duly received into a hospital or other institution in pursuance of the arrangements made under s 86(2): s 91(1). As to restriction orders see PARA 496 ante. See also PARA 518 ante.

UPDATE

548 Removal of alien patients

TEXT AND NOTES 1-10--The functions under the Mental Health Act 1983 s 86 are, so far as exercisable in relation to Wales, transferred to the Welsh Ministers, except in relation to a patient who is subject to one or more of the following, namely (1) a restriction order made under s 41 (see PARA 496); (2) a hospital direction made under s 45A(3)(a) (see PARA 490); (3) a limitation direction made under s 45A(3)(b) (see PARA 490); or (4) a restriction made under s 49 (see PARA 537): Welsh Ministers (Transfer of Functions) Order 2008, SI 2008/1786, art 2(a).

TEXT AND NOTE 4--Reference to mental illness now to mental disorder: Mental Health Act 1983 s 86(1) (amended by Mental Health Act 2007 Sch 1 para 15(2)).

NOTE 10--SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705.

TEXT AND NOTE 11--Mental Health Act 1983 s 91(2) amended: Mental Health Act 2007 s 40(6), Sch 11 Pt 8. For effect see s 40(7).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(14) PLACE OF SAFETY POWERS/549. Warrants to search for and remove patients.

(14) PLACE OF SAFETY POWERS

549. Warrants to search for and remove patients.

If it appears to a justice of the peace¹, on information² on oath laid by an approved social worker³, that there is reasonable cause to suspect that a person believed to be suffering from mental disorder⁴ has been or is being ill-treated, neglected⁵ or kept otherwise than under proper control⁶, in any place within the jurisdiction of the justice⁷, or, being unable to care for himself, is living alone in any such place, the justice may issue a warrant⁸ authorising any constable⁹ to enter, if need be by force, any premises specified in the warrant in which that person is believed to be and, if thought fit, to remove him to a place of safety¹⁰ with a view to the making of an application for his compulsory admission to hospital and guardianship¹¹ or other arrangements¹² for his treatment or care¹³.

Furthermore, if it appears to a justice of the peace, on information on oath¹⁴ laid by any constable or other person who is authorised¹⁵ to take a patient to any place¹⁶, or to take into custody or retake a patient who is liable under the Mental Health Act 1983 to be so taken or retaken¹⁷, that there is reasonable cause to believe that the patient is to be found on premises within the jurisdiction of the justice, and that admission to the premises has been refused or that a refusal of such admission is apprehended, the justice may issue a warrant authorising any constable¹⁸ to enter the premises, if need be by force, and remove the patient¹⁹.

A patient who is removed to a place of safety under these provisions²⁰ may be detained there for a period not exceeding 72 hours²¹. A person who escapes while being taken to or detained in a place of safety cannot be retaken²² after the expiration of 72 hours beginning with the time of his escape or the period for which he is liable to be so detained, whichever expires first²³.

1 As to justices of the peace see MAGISTRATES vol 29(2) (Reissue) PARA 501 et seq.

2 The information need not name the patient: Mental Health Act 1983 s 135(5). For the meaning of 'patient' see PARA 435 ante.

3 As to the meaning of 'approved social worker', and as to his functions, see PARAS 427, 450 ante.

4 It seems that an approved social worker should satisfy himself as to the sufficiency of the grounds for belief that the person is suffering from mental disorder: see *Buxton v Jayne* [1960] 2 All ER 688 at 695-696, [1960] 1 WLR 783 at 792-793, CA (construction of analogous provisions in the Lunacy Act 1890 ss 14, 20 (repealed)). For the meaning of 'mental disorder' see PARA 402 ante.

5 It seems that a justice might hesitate to issue a warrant upon the ground of neglect unless there was reasonable cause to suspect that neglect was causing the patient some degree of physical distress: see *R v Board of Control, ex p Rutty* [1956] 2 QB 109, [1956] 1 All ER 769, DC (construing the words 'found neglected' in the Mental Deficiency Act 1913 s 2 (1) (b) (i) (repealed)). However, a person might have been 'found neglected' within that enactment if, although living in a comfortable home, he was not receiving the training he ought to have been receiving: *Re Wilkinson* (1919) 83 JP Jo 422.

6 Cf *Richardson v LCC* [1957] 2 All ER 330, [1957] 1 WLR 751, CA, where it was held that a person could be 'found neglected' within the meaning of the Mental Deficiency Act 1913 s 2(1)(b)(i) (repealed) if he was not under the control which he ought to be under. There is no need for a warrant if the person has no right to exclusive occupation (eg a room in a hotel where members of the public can reside): see *R v Rosso* [2003] EWCA Crim 3242, [2003] All ER (D) 381 (Nov).

7 As to the areas of jurisdiction see MAGISTRATES vol 29(2) (Reissue) PARA 521 et seq.

8 The warrant need not name the patient concerned: Mental Health Act 1983 s 135(5).

9 When executing the warrant, the constable must be accompanied by an approved social worker (not necessarily the approved social worker who laid the information under *ibid* s 135(1) (as amended)) and a registered medical practitioner: s 135(4) (amended by the Police and Criminal Evidence Act 1984 s 119(1), Sch 6 Pt I para 26). For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante. The constable need not be named in the warrant: Mental Health Act 1983 s 135(1) (amended by the Police and Criminal Evidence Act 1984 s 119(2), Sch 7 Pt I). As to the office of constable see POLICE vol 36(1) (2007 Reissue) PARA 101 et seq.

There is no power enabling the naming of professionals in the warrant. Accordingly, names on a warrant are surplus to requirements and thus have no effect on the legality of the warrant or of its execution: see *Ward v Metropolitan Police Comr* [2005] UKHL 32, [2005] 3 All ER 1013, (2005) Times, 9 May.

10 'Place of safety' means residential accommodation provided by a local social services authority under the National Assistance Act 1948 Pt III (ss 21-35) (as amended) (see PARA 425 ante; and SOCIAL SERVICES AND COMMUNITY CARE), a hospital (see PARA 417 ante), a police station (although a police station should only be used as a place of safety in exceptional circumstances and the patients should be moved elsewhere as soon as possible: see the memorandum issued by the Department of Health and Social Security, 'Mental Health Act 1983: Memorandum on Parts I to VI, VII and X' (1987)), an independent hospital or care home for mentally disordered persons (see PARAS 421, 430, 432 ante; and SOCIAL SERVICES AND COMMUNITY CARE), or any other suitable place the occupier of which is willing temporarily to receive the patient: Mental Health Act 1983 s 135(6) (amended by the National Health Service and Community Care Act 1990 s 66(2), Sch 10; and the Care Standards Act 2000 s 116, Sch 4 para 9(1), (9)).

11 Is an application under the Mental Health Act 1983 Pt II (ss 2-34) (as amended): see PARA 460 et seq ante.

12 Eg arrangements for the informal admission of the patient to hospital (see PARA 437 ante) or for him to be cared for in the community (see PARAS 415-416, 424 et seq ante).

13 Mental Health Act 1983 s 135(1) (as amended: see note 9 supra). The alternative power to remove remains the Police and Criminal Evidence Act 1984 s 17(1)(d) (as amended): see *D'Souza v DPP* [1992] 4 All ER 545, [1992] 1 WLR 1073; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 884. As to the common law power see *McLeod v Metropolitan Police Comr* [1994] 4 All ER 553, CA. For the purposes of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 8 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 149 et seq), entry into a person's home must be proportionate.

14 In this case the information must name the patient: cf the position under the Mental Health Act 1983 s 135 (as amended) (see note 2 supra).

15 Is under the Mental Health Act 1983 or the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 8 (see PARA 508 ante).

16 Eg an approved social worker who has authority to convey a patient to hospital for the purpose of compulsory admission under the Mental Health Act 1983 s 6(1): see PARA 464 ante.

17 Eg a person authorised in writing by the managers (see PARA 439 ante) of a hospital to retake and return a patient liable to be detained who is absent without leave under *ibid* s 18(1): see PARA 507 ante.

18 When executing the warrant, the constable may (but need not) be accompanied by a registered medical practitioner and by a person authorised under the Mental Health Act 1983 or the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 8 to take or retake the patient: Mental Health Act 1983 s 135(4) (amended by the Mental Health (Scotland) Act 1984 s 127(1), Sch 3 para 56; the Police and Criminal Evidence Act 1984 Sch 6 Pt I para 26; and the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 15, Sch 1 para 2(1), (9)(a)). Cf the requirements when executing a warrant under the Mental Health Act 1983 s 135(1) (as amended): see note 9 supra.

19 *Ibid* s 135(2) (amended by the Mental Health (Scotland) Act 1984 Sch 3 para 56; the Police and Criminal Evidence Act 1984 Sch 7 Pt I; and the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), Sch 1 para 2(1), (9)(b)). The constable need not be named in the warrant: Mental Health Act 1983 s 135(2) (as so amended).

20 Is under *ibid* s 135(1), (2) (as amended) (see the text and notes 1-19 supra).

21 *Ibid* s 135(3).

22 le under ibid s 138 (see PARA 447 ante).

23 See ibid s 138(3); and PARA 447 ante.

UPDATE

549 Warrants to search for and remove patients

NOTE 9--*Ward*, cited, reported at [2006] 1 AC 23.

TEXT AND NOTE 21--Within such 72-hour period, a constable, an approved mental health professional or a person authorised by either of them for these purposes may take the patient so detained to one or more other places of safety: Mental Health Act 1983 s 135(3A), (3B) (added by Mental Health Act 2007 s 44(2)).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(14) PLACE OF SAFETY POWERS/550. Removal of mentally disordered persons found in public places.

550. Removal of mentally disordered persons found in public places.

If a constable¹ finds in a place to which the public has access² a person who appears to him to be suffering from mental disorder³ and to be in immediate need of care or control, then, if he thinks it necessary to do so in the interests of that person or for the protection of other persons, the constable may remove him to a place of safety⁴. A person so removed to a place of safety may be detained there for a period not exceeding 72 hours⁵ for the purpose of examination by a registered medical practitioner⁶, interview by an approved social worker⁷ and the making of any necessary arrangements⁸ for his treatment or care⁹.

1 As to the office of constable see POLICE vol 36(1) (2007 Reissue) PARA 101 et seq.

2 A public place is a place to which the public can and do have access; it does not matter whether they came at the invitation of the occupier or merely with his permission, or whether some payment or the performance of some formality is required before access can be had: *R v Kane* [1965] 1 All ER 705. See also *R v Edwards* (1978) 67 Cr App Rep 228; *Carter v Metropolitan Police Comr* [1975] 2 All ER 33, [1975] 1 WLR 507; *Knox v Anderton* (1982) 76 Cr App Rep 156.

3 For the meaning of 'mental disorder' see PARA 402 ante.

4 Mental Health Act 1983 s 136(1). For the meaning of 'place of safety' see PARA 549 note 10 ante. This power of arrest is specifically preserved by the Police and Criminal Evidence Act 1984 s 26(2), Sch 2: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 927.

For an illustration of the use of the Mental Health Act 1983 s 136 see *R (on the application of Anderson) v HM Coroner for Inner North Greater London* [2004] EWHC 2729 (Admin), [2004] All ER (D) 410 (Nov).

5 As to the power to retake persons who escape while being taken to or detained in a place of safety under this provision see PARA 549 ante. See also PARA 447 ante.

6 For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.

7 For the meaning of 'approved social worker', and as to his functions, see PARAS 427, 450 ante.

8 Eg for his compulsory (see PARA 460 et seq ante) or informal (see PARA 437 ante) admission to hospital or for his care in the community (see PARAS 414-415, 424 et seq ante). If suitable arrangements can be made, these may be regarded as an alternative to prosecuting him for an offence he may be alleged to have committed (see PARA 486 ante).

9 Mental Health Act 1983 s 136(2). The Code of Practice (1999) PARA 10.8 states that the authority to detain a person under this provision lapses once he has been seen by a registered medical practitioner and interviewed by an approved social worker, and any necessary arrangements have been made. As to the Code of Practice see PARA 436 ante.

UPDATE

550 Removal of mentally disordered persons found in public places

TEXT AND NOTES 5-9--Within such 72-hour period, a constable, an approved mental health professional or a person authorised by either of them for these purposes may take the person so removed to one or more other places of safety: Mental Health Act 1983 s 136(3), (4) (added by Mental Health Act 2007 s 44(3)).

TEXT AND NOTE 7--Reference to an approved social worker now to an approved mental health professional: Mental Health Act 1983 s 136(2) (amended by Mental Health Act 2007 Sch 2 para 10(b)).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(15) CONSENT TO TREATMENT/551. Patients to whom consent to treatment provisions apply.

(15) CONSENT TO TREATMENT

551. Patients to whom consent to treatment provisions apply.

Part IV of the Mental Health Act 1983¹ makes provision as to a patient's² consent to treatment. It applies to any patient liable to be detained³ except where he is detained⁴: (1) under the provisions relating to an emergency application for assessment⁵; (2) under the provisions relating to temporary detention of an in-patient following a report by either the registered medical practitioner in charge of the patient's treatment or by a nurse of the prescribed class⁶; (3) under the provisions relating to a remand to hospital for report⁷; (4) under the provisions relating to a removal by warrant to a place of safety⁸; (5) under the provisions relating to a removal to a place of safety by a constable⁹; (6) under the provisions relating to a direction for detention pending admission to hospital under a hospital order¹⁰; (7) following a conditional discharge¹¹. However, certain provisions¹² apply to patients who are not liable to be detained¹³.

1 Ie the Mental Health Act 1983 Pt IV (ss 56-64) (as amended). As to medical treatment and second opinions generally see Code of Practice (1999) chs 15, 16. As to the importance of the code see *R (on the application of Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, [2005] All ER (D) 139 (Oct). As to the Code of Practice see PARA 436 ante.

The Mental Health Act 1983 Pt IV (as amended) overrides the common law in respect of those falling within it. As to the effect of the Mental Capacity Act 2005, when it comes into force, on the Mental Health Act 1983 Pt IV (as amended) see PARA 559 post. Part IV (as amended) does not apply to the medical treatment (see PARA 552 post) of detained or informal patients (see notes 2-3 infra) other than for mental disorder (see PARA 402 ante) or the treatment of mental disorder of informal patients falling outside s 57 (see PARA 554 post): until the commencement of the Mental Capacity Act 2005, which will apply to those who are incapacitated, such treatment will continue to be governed by the common law.

2 For the meaning of 'patient' see PARA 435 ante.

3 Ie detained under the Mental Health Act 1983 Pt II (ss 2-34) (as amended) or Pt III (ss 35-55) (as amended). Guardianship and informal hospital patients are not liable to be detained; but see the text and note 10 infra.

4 Ibid s 56(1).

5 Ie under ibid s 4(1), where a second medical recommendation as required under s 4(4)(a) has not been given and received. See PARA 462 ante.

6 Ie under ibid s 5(2), (4): see PARA 463 ante.

7 Ie under ibid s 35: see PARA 489 ante.

8 Ie under ibid s 135 (as amended): see PARA 549 ante.

9 Ie under ibid s 136: see PARA 550 ante.

10 Ie under ibid s 37(4) (as amended): see PARA 495 ante.

11 Ie the conditional discharge of a restricted patient under ibid s 42(2) by the Secretary of State (see PARA 524 ante) or under s 73 (as amended) or s 74 (as amended) by a mental health review tribunal (see PARAS 570-571 post).

12 Ie ibid s 57 and, so far as relevant to that provision, ss 59-60, 62: see PARA 554 post.

13 Ibid s 56(2).

UPDATE

551 Patients to whom consent to treatment provisions apply

NOTE 1--*Munjaz*, cited, reported at [2006] 2 AC 148.

NOTES 4, 13--Mental Health Act 1983 s 56 substituted: Mental Health Act 2007 s 34(2).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(15) CONSENT TO TREATMENT/552. Meaning of 'medical treatment'.

552. Meaning of 'medical treatment'.

In the Mental Health Act 1983, 'medical treatment' includes nursing; and it also includes care, habilitation and rehabilitation under medical supervision¹.

¹ Mental Health Act 1983 s 145(1).

UPDATE

552 Meaning of 'medical treatment'

TEXT AND NOTE 1--Replaced. 'Medical treatment' now includes nursing, psychological intervention and specialist mental health habilitation, rehabilitation and care; and any reference in the Mental Health Act 1983 to medical treatment, in relation to mental disorder, is to be construed as a reference to medical treatment the purpose of which is to alleviate, or prevent a worsening of, the disorder or one or more of its symptoms or manifestations: s 145(1), (4) (s 145(1) amended, s 145(4) added, by Mental Health Act 2007 s 7).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(15) CONSENT TO TREATMENT/553. Treatment without consent.

553. Treatment without consent.

The consent of a patient¹ to whom Part IV of the Mental Health Act 1983² applies³ is not required for any medical treatment⁴ given to him for the mental disorder⁵ from which he is suffering⁶, not being one of the specific treatments requiring consent and/or a second opinion under the Act⁷, provided that the treatment is given by or under the direction of the responsible medical officer⁸.

Generally, but subject to the above requirements of the Mental Health Act 1983 in respect of certain treatments, at common law a doctor may lawfully operate upon or give other treatment to adult patients⁹ who are incapable¹⁰ of consenting to his doing so, provided that the operation or treatment is in the best interests of such patients¹¹.

1 For the meaning of 'patient' see PARA 435 ante.

2 I.e. the Mental Health Act 1983 Pt IV (ss 56-64) (as amended). As to the effect of the Mental Capacity Act 2005 on the Mental Health Act 1983 Pt IV (as amended) see PARA 559 post.

3 As to such patients see PARA 551 ante.

4 As to the meaning of 'medical treatment' see PARA 552 ante.

5 For the meaning of 'mental disorder' see PARA 402 ante. As to 'medical treatment for the mental disorder' see *B v Croydon Health Authority* [1995] 1 All ER 683, [1995] 1 FCR 662, (1994) 22 BMLR 13, CA. Medical treatment may cover nursing and caring for a patient in seclusion, even though seclusion does not properly form part of a treatment programme: see *R (on the application of Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, [2005] All ER (D) 139 (Oct). See also *Tameside and Glossop Acute Services Trust v CH* [1996] 1 FCR 753, [1996] 1 FLR 762, 31 BMLR 93 (where the treatment amounted to dealing with danger to an unborn child); but distinguish *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 All ER 819, [1994] 2 FCR 151.

In *T v T* [1988] Fam 52, [1988] 1 All ER 613, it was held that termination of pregnancy and sterilisation of a mentally handicapped woman were not treatment for her mental disorder. See also *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545, HL; *St George's Healthcare NHS Trust v S, R v Collins, ex p S* [1998] 3 All ER 673, CA. However, in *R v Mental Health Act Commission, ex p W* (1988) Times, 27 May, it was said by Stuart-Smith LJ that, where a patient was both mentally disordered and sexually deviant, 'it seems likely that the sexual problem will be inextricably linked with mental disorder, so that treatment for one is treatment for the other'. See also *South West Hertfordshire Health Authority v KB* [1994] 2 FCR 1051 (anorexia nervosa amounts to mental disorder; no consent required for naso-gastric feeding as integral part of treatment).

6 On their true construction, the words of the Mental Health Act 1983 s 63 authorise a patient to be treated for any mental disorder from which he is suffering, irrespective of whether that fell within the form of disorder from which he was classified as suffering in the application, order or direction justifying his detention: *R (on the application of B) v Ashworth Hospital Authority* [2005] UKHL 20, [2005] 2 All ER 289. See *R (on the application of B) v Haddock* [2005] EWHC 921 (Admin), [2005] All ER (D) 309 (May) (although there were strong views that the claimant's proposed treatment was not justified, that was outweighed, in the circumstances of the case, by more decisive evidence that the claimant was suffering from a mental disorder the classification of which was irrelevant provided that the proposed treatment was required to alleviate it (as it had done in the past), and he lacked capacity to refuse the treatment). See also *R (on the application of Taylor) v Haydn-Smith* [2005] All ER (D) 460 (May) (in the circumstances of the case, the claimant was clearly suffering from a mental illness that required treatment and he lacked capacity to refuse).

7 I.e. treatment falling within the Mental Health Act 1983 ss 57-58: see PARAS 554-555 post. In particular after three months of treatment with consent, s 58(3)(b) (see PARA 555 post) applies and consent or a second opinion is required for administering medicine, and the common law will apply to treatment outside these provisions: see PARA 551 note 1 ante. See also PARAS 612-613 post.

8 Ibid s 63. For these purposes, 'responsible medical officer' means the registered medical practitioner in charge of the treatment of the patient in question: s 64(1). For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.

See *B v Croydon Health Authority* [1995] 1 All ER 683, [1995] 1 FCR 662, (1994) 22 BMLR 13, CA (feeding by tube in the circumstances part of medical treatment); *R (on the application of Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, [2005] All ER (D) 139 (Oct) (seclusion capable of being within 'medical treatment'). See *Tameside and Glossop Acute Services Trust v CH* [1996] 1 FCR 753, [1996] 1 FLR 762, 37 BMLR 93 (where the schizophrenic patient lacked the ability to give meaningful consent due to her mental disorder, treatment could in the circumstances be administered without consent); but see *Re C (Adult: Refusal of Treatment)* [1994] 1 All ER 819, [1994] 2 FCR 151 (where it was held that the schizophrenic patient was not so mentally ill as not to be capable of giving or withholding meaningful consent). See *R v Collins, ex p Brady* (2000) 58 MHLR 17 (patient's hunger strike was a symptom of his personality disorder so that force feeding was permitted under the Mental Health Act 1983 s 63).

9 As to minor patients see PARA 437 note 10 ante. See also PARA 613 post.

10 As to capacity and incapacity to consent to medical treatment see PARA 612 post.

11 See generally paras 612-613 post.

UPDATE

553 Treatment without consent

NOTES 5, 8--*Munjaz*, cited, reported at [2006] 2 AC 148.

NOTE 6--*Haddock*, cited, affirmed: [2006] EWCA Civ 961, [2006] All ER (D) 137 (Jul) (see PARA 613).

TEXT AND NOTE 8--References to responsible medical officer now to approved clinician in charge of the treatment: Mental Health Act 1983 s 63 (amended by Mental Health Act 2007 s 12(6)). 'Responsible clinician' means the approved clinician with overall responsibility for the case: Mental Health Act 1983 s 64(1) (amended by Mental Health Act 2007 s 12(7)(a)). References in the Mental Health Act 1983 Pt IV to the approved clinician in charge of a patient's treatment are to be construed, where the treatment in question is a form of treatment to which s 57 (see PARA 554) applies, as references to the person in charge of the treatment: s 64(1A) (added by Mental Health Act 2007 s 12(7)(b)). Mental Health Act 1983 s 64(1B), (1C) added: Mental Health Act 2007 s 28(9).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(15) CONSENT TO TREATMENT/554. Treatment requiring consent and a second opinion.

554. Treatment requiring consent and a second opinion.

The provisions of the Mental Health Act 1983 requiring consent and a second opinion¹ apply to the following forms of treatment² for mental disorder³: (1) surgical operations for destroying brain tissue or for destroying the functioning of brain tissue⁴; and (2) the surgical implantation of hormones for the purpose of reducing male sexual drive⁵.

Except in cases of urgency⁶, a patient⁷ must not be given such treatment unless: (a) he has consented to it⁸; (b) an appointed registered medical practitioner⁹ (not being the responsible medical officer¹⁰) and two other persons¹¹ (not being medical practitioners) have certified¹² in writing that the patient is capable of understanding the nature, purpose and likely effects of the treatment and has consented to it¹³; (c) the appointed medical practitioner¹⁴ has certified¹⁵ in writing that, having regard to the likelihood of the treatment's alleviating or preventing a deterioration of the patient's condition, the treatment should be given¹⁶.

A patient may at any time before completion of the treatment withdraw his consent; the statutory provisions then apply to the remainder of the treatment as if it were a separate form of treatment¹⁷.

1 Ie the Mental Health Act 1983 s 57. As to the effect of the Mental Capacity Act 2005 on the Mental Health Act 1983 Pt IV (ss 56-64) (as amended) see PARA 559 post.

2 Any consent or certificate under the Mental Health Act 1983 s 57 may relate to a plan of treatment under which the patient is to be given one or more of the forms of treatment to which s 57 applies: s 59.

3 For the meaning of 'mental disorder' see PARA 402 ante.

4 Mental Health Act 1983 s 57(1)(a). Section 57 and, so far as relevant to that provision, ss 59, 60 and 62 apply also to any patient who is not liable to be detained (ie informal patients): s 56(2).

5 Ie such other form of treatment as may be specified for the purpose of ibid s 57 by regulations made (after consulting such bodies as appear to him to be concerned) by the Secretary of State: ss 57(1)(b), (4), 143(1); Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 16(1). A course of treatment with a drug which is not a hormone and not surgically implanted does not fall within this provision: *R v Mental Health Act Commission, ex p W* (1988) Times, 27 May, DC. See also *R v Mental Health Act Commission, ex p X* (1988) 9 BMLR 77. As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

6 As to urgent treatment see the Mental Health Act 1983 s 62; and PARA 557 post.

7 As to the patients to whom this provision applies see PARA 551 ante.

8 Mental Health Act 1983 s 57(2)(a). As to withdrawal of consent see s 60; and note 17 infra.

9 Ie a medical practitioner appointed for these purposes by the Mental Health Act Commission acting on behalf of the Secretary of State: ibid ss 57(2)(a), 121(2)(a), 143(1); Mental Health Act Commission (Establishment and Constitution) Order 1983, SI 1983/892 (amended by SI 1998/1577). The Secretary of State may make provision for payment of remuneration, allowances, pensions or gratuities in respect of appointed medical practitioners: Mental Health Act 1983 s 119(1). An appointed practitioner may, for the purpose of exercising his functions, at any reasonable time visit and interview and examine in private any patient detained in a registered establishment and require the production of and inspect any records relating to the treatment of the patient in that establishment: s 119(2) (amended by the Care Standards Act 2000 s 116, Sch 4 para 9(1), (2)). For the meaning of 'registered establishment' see PARA 421 ante. The Mental Health Act Commission has no function for these purposes except to appoint the three panel members on behalf of the Secretary of State: see *X v A, B and C and the Mental Health Act Commission* (1991) 9 BMLR 91. As to the constitution and functions of the Mental Health Act Commission see PARA 413 ante.

10 For meaning of 'responsible medical officer' see PARA 553 note 8 ante.

11 le appointed by the Mental Health Act Commission: see note 9 supra.

12 le in the form prescribed by the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 16(1)(b), Sch 1 Form 37.

13 Mental Health Act 1983 s 57(2)(a). See *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 All ER 819, [1994] 2 FCR 151. As to the common law test see *Re MB* [1997] 8 Med LR 217, CA; *R (on the application of Wilkinson) v Responsible Officer of Broadmoor Hospital* [2001] EWCA Civ 1545, [2002] 1 WLR 419. The appointed persons are 'public authorities' within the Human Rights Act 1998 s 6 (as amended) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS): *R (on the application of Wilkinson) v Responsible Officer of Broadmoor Hospital* supra.

14 See note 9 supra.

15 See note 12 supra.

16 Mental Health Act 1983 s 57(2)(b). Before giving such a certificate, the practitioner must consult two other persons (one of whom must be a nurse and the other neither a nurse nor a medical practitioner) who have been professionally concerned with the patient's treatment: s 57(3). The consultation can take place with a person who has no current involvement with the patient if it is reasonable to do so in the context of the non-availability of a person with current involvement: *R (on the application of Wooder) v Feggetter* [2002] EWCA Civ 554, [2003] QB 219. See also *R v Mental Health Act Commission, ex p X* (1988) 9 BMLR 77.

As to the private duty of care of the appointed doctors see *X v A, B and C and the Mental Health Act Commission* (1991) 9 BMLR 91. As to the independence of the appointed doctor, fairness, and the need for written reasons see *R (on the application of Wilkinson) v Responsible Officer of Broadmoor Hospital* [2002] EWCA Civ 1545, [2002] 1 WLR 419.

17 Mental Health Act 1983 s 60(1). Without prejudice to s 60(1), a patient may withdraw his consent to further treatment under a plan of treatment or to further treatment of any description under the plan: s 60(2).

UPDATE

554 Treatment requiring consent and a second opinion

NOTE 4--Reference to Mental Health Act 1983 ss 59, 60 and 62 now to ss 59-62: s 56(1) (s 56 substituted by Mental Health Act 2007 s 34(2)).

NOTES 5, 12--SI 1983/893 replaced by Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439: see PARA 511-516.

NOTES 9, 11--References to Mental Health Commission now to Care Quality Commission (see PARA 413): Mental Health Act 1983 s 57(2)(a) (amended by Health and Social Care Act 2008 s 52(1), Sch 3 para 2). Registered medical practitioners, and other persons, appointed or authorised by the Care Quality Commission in the exercise of a function under the 1983 Act may include members or employees of the Care Quality Commission: Health and Social Care Act 2008 s 52(2).

NOTE 9--References to the Secretary of State are now to the regulatory authority (see PARA 441), and reference to any patient detained in a registered establishment is now to any patient detained in a hospital or registered establishment or any community patient in a hospital or establishment of any description or (if access is granted) other place: Mental Health Act 1983 s 119(1), (2) (amended by Mental Health Act 2007 s 35(2)(a); and Health and Social Care Act 2008 s 52(1), Sch 3 para 7, Sch 15 Pt 1). 'Establishment of any description' is to be construed in accordance with the Care Standards Act 2000 s 4(8) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 985 NOTE 1): Mental Health Act 1983 s 119(3) (added by Mental Health Act 2007 s 35(2)(b)). SI 1983/892 revoked: Health and Social Care Act 2008 Sch 15 Pt 1.

TEXT AND NOTE 13--Mental Health Act 1983 s 57(2)(a) amended: Mental Health Act 2007 s 12(2)(a).

TEXT AND NOTE 16--For 'having regard ... be given' read 'it is appropriate for the treatment to be given': Mental Health Act 1983 s 57(2)(b) (amended by Mental Health Act 2007 s 6(2)(a)). For the purposes of the Mental Health Act 1983 Pt IV, it is appropriate for treatment to be given to a patient if the treatment is appropriate in his case, taking into account the nature and degree of the mental disorder from which he is suffering and all other circumstances of his case: s 64(3) (added by Mental Health Act 2007 s 6(3)).

NOTE 16--Mental Health Act 1983 s 57(3) amended: Mental Health Act 2007 s 12(2)(b).

TEXT AND NOTE 17--Mental Health Act 1983 s 60(1), (2) amended, s 60(1A)-(1D) added: Mental Health Act 2007 ss 28(4), 29.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(15) CONSENT TO TREATMENT/555. Treatment requiring consent or a second opinion.

555. Treatment requiring consent or a second opinion.

The provisions of the Mental Health Act 1983 requiring consent or a second opinion¹ apply to the following forms of treatment² for mental disorder³: (1) electro-convulsive therapy⁴; and (2) the administration of medicine by any means if three months or more have elapsed since the first occasion during the patient's period of detention when medicine was administered to him by any means for his mental disorder⁵.

Except in the case of urgency⁶, a patient⁷ may not be given such treatment unless either: (a) he has consented to it and the responsible medical officer⁸ or an appointed registered medical practitioner⁹ has certified¹⁰ in writing that the patient is capable of understanding its nature, purpose and likely effects and has consented to it¹¹; or (b) the appointed medical practitioner¹² has certified¹³ in writing that the patient is not capable of understanding the nature, purpose and likely effects of that treatment or has not consented to it but that, having regard to the likelihood of its alleviating or preventing a deterioration of his condition, the treatment should be given¹⁴.

Consent to treatment may be withdrawn¹⁵.

¹ I.e. the Mental Health Act 1983 s 58. As to the effect of the Mental Capacity Act 2005 on the Mental Health Act 1983 Pt IV (ss 56-64) (as amended) see PARA 559 post.

² Any consent or certificate under *ibid* s 58 may relate to a plan of treatment under which the patient is to be given one or more of the forms of treatment referred to in s 58: s 59.

³ For the meaning of 'mental disorder' see PARA 402 ante.

⁴ I.e. such form of treatment as may be specified for the purpose of the Mental Health Act 1983 s 58 by regulations made (after consultation with such bodies as appear to him to be concerned) by the Secretary of State: ss 58(1)(a), (5), 143(1); Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 16(2). As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

⁵ Mental Health Act 1983 s 58(1)(b). The period mentioned in the text may be varied by order of the Secretary of State: ss 58(2), 143(1).

⁶ As to urgent treatment see *ibid* s 62; and PARA 557 post.

⁷ As to the patients to whom this provision applies see PARA 551 ante.

⁸ For the meaning of 'responsible medical officer' see PARA 553 note 8 ante.

⁹ As to appointed medical practitioners see PARA 554 note 9 ante.

¹⁰ I.e. in the form prescribed by the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, SI 1983/893, reg 16(2)(b), Sch 1 Form 38 (certificate of consent to treatment) or Sch 1 Form 39 (certificate of second opinion). A doctor certifying that a restricted patient should be given treatment without consent should give reasons in writing his opinion; those reasons may be disclosed to the patient unless to do so is likely to cause serious harm to the physical or mental health of the patient or another person: *R (on the application of Wooder) v Feggetter* [2002] EWCA Civ 554, [2003] QB 219.

¹¹ Mental Health Act 1983 s 58(3)(a).

¹² See note 9 supra.

¹³ See note 10 supra.

14 Mental Health Act 1983 s 58(3)(b). Before giving such a certificate, the practitioner must consult two other persons (one of whom must be a nurse and the other neither a nurse nor a medical practitioner) who have been professionally concerned with the patient's treatment: s 58(4).

'Mental disorder' is to be construed widely and beyond formal classification: see *R (on the application of B) v Ashworth Hospital Authority* [2005] UKHL 20, [2005] 2 All ER 289; *R (on the application of B) v Haddock* [2005] EWHC 921 (Admin), [2005] All ER (D) 309 (May); and see also PARA 553 note 6 ante. On an application for judicial review of a decision under s 58(3)(b), the court is entitled to reach its own view as to the merits of the decision and whether it infringes the patient's human rights, and the patient is entitled to require the attendance of medical experts for cross-examination: *R (on the application of Wilkinson) v Broadmoor Hospital* [2001] EWCA Civ 1545, [2002] 1 WLR 419, (2001) 65 BMLR 15. This case was decided on the basis that the certification process by the appointed doctor is one that engages the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6. As to the appropriate standard of proof to be applied by the court see *R (on the application of N) v M* [2002] EWCA Civ 1789, [2003] 1 WLR 562, [2003] 1 FCR 124. The court must decide also whether the proposed treatment would infringe the Convention on Human Rights and Fundamental Freedoms arts 2, 3 or 8: see *R (on the application of Wilkinson) v Broadmoor Hospital* supra. See also *R (on the application of B) v S* [2005] EWHC 1936 (Admin), [2005] All ER (D) 38 (Sep). As to the Convention see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq. See also PARA 554 ante.

15 See the Mental Health Act 1983 s 60; and PARA 554 ante.

UPDATE

555 Treatment requiring consent or a second opinion

TEXT AND NOTES--Subject to the Mental Health Act 1983 s 62, electro-convulsive therapy and any other treatment, specified for the purposes of the Mental Health Act 1983 s 58A by regulations, may only be given when a patient either gives consent, or is incapable of giving consent: s 58A (added by Mental Health Act 1983 s 27). See Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, SI 2008/1184; Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008, SI 2008/2439; and PARA 511-516.

NOTE 2--Mental Health Act 1983 s 59 amended to refer also to s 58A: Mental Health Act 1983 s 28(3).

NOTE 5--Mental Health Act 1983 s 58(1)(b) amended: Mental Health Act 2007 s 28(2)(a).

TEXT AND NOTE 8--Reference to the responsible medical officer now to the approved clinician in charge of the treatment: Mental Health Act 1983 s 58(3)(a) (amended by Mental Health Act 2007 s 12(3)(a)(i)).

NOTE 11--Mental Health Act 1983 s 58(3)(a) further amended: Health and Social Care Act 2008 s 52(1), Sch 3 para 3.

TEXT AND NOTES 12-14--Under head (b) the appointed medical practitioner must be neither the responsible clinician (see PARA 506) nor the approved clinician in charge of the treatment in question; and for 'having regard ... be given' read 'it is appropriate for the treatment to be given': Mental Health Act 1983 s 58(3)(b) (amended by Mental Health Act 2007 s 12(3)(a)(ii)).

NOTE 14--Mental Health Act 1983 s 58(3)(b) amended: Mental Health Act 2007 s 28(2)(b). In addition, neither of the two other persons consulted must be the responsible clinician or the approved clinician in charge of the treatment in question: Mental Health Act 1983 s 58(4) (amended by Mental Health Act 2007 s 12(3)(b)). *R (on the application of B) v S*, cited, affirmed: [2006] EWCA Civ 28, [2006] 1 WLR 810.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(15) CONSENT TO TREATMENT/556. Treatment giving rise to special concern.

556. Treatment giving rise to special concern.

A code of practice must be prepared and from time to time revised¹. It must in particular specify additional forms of medical treatment² which give rise to special concern and which should accordingly not be given by a medical practitioner unless: (1) the patient has consented to the treatment, or to a plan of treatment including that treatment; and (2) a certificate⁴ in writing has been given by an appointed registered medical practitioner³ that the patient is capable of understanding its nature, purpose and likely effects and that having regard to the likelihood of its alleviating or preventing a deterioration of his condition it should be given⁵.

1 See the Mental Health Act 1983 s 118(1) (as amended); and PARAS 410, 436 ante. Section 118 (as amended) provides that the code is to be prepared and revised by the Secretary of State, but the functions of the Secretary of State under s 118 (as amended) have been delegated to the Mental Health Act Commission (see the Mental Health Act Commission (Establishment and Constitution) Order 1983, SI 1983/892 (amended by SI 1998/1577)). As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante. As to the constitution and functions of the Mental Health Act Commission see PARA 413 ante. As to the effect of the Mental Capacity Act 2005 on the Mental Health Act 1983 Pt IV (ss 56-64) (as amended) see PARA 559 post.

Certain bodies that appear to be concerned must be consulted before the code is prepared or altered: see s 118(3).

2 I.e. other than those specified by regulations made for the purposes of *ibid* s 57: see PARA 554 ante. As to the meaning of 'medical treatment' see PARA 552 ante.

3 As to appointed practitioners see PARA 554 note 9 ante.

4 I.e. a certificate as to the matters mentioned in the Mental Health Act 1983 s 57(2)(a), (b): see PARA 554 ante.

5 *Ibid* s 118(2). As to care and treatment see also PARA 436 ante.

UPDATE

556 Treatment giving rise to special concern

NOTE 1--Functions of the Secretary of State under the Mental Health Act 1983 s 118 now transferred to the Care Quality Commission (see PARA 413): Health and Social Care Act 2008 s 52(1). The Commission may at any time make proposals to the Secretary of State as to the content of the code of practice which the Secretary of State must prepare, and from time to time revise, under the Mental Health Act 1983 s 118 in relation to England: s 118(7) (added by Health and Social Care Act 2008 Sch 3 para 6(3)). SI 1983/892 revoked: Health and Social Care Act 2008 Sch 15 Pt 1.

TEXT AND NOTES 2-5--Mental Health Act 1983 s 118(2) amended: Health and Social Care Act 2008 Sch 3 para 6(2).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(15) CONSENT TO TREATMENT/557. Urgent treatment.

557. Urgent treatment.

The special requirements for certain treatments¹ do not apply² to any treatment which: (1) is immediately necessary to save the patient's life³; (2) not being irreversible⁴, is immediately necessary to prevent a serious deterioration of his condition⁵; or (3) not being irreversible⁶ or hazardous⁷ is immediately necessary to alleviate serious suffering by the patient or is immediately necessary and represents the minimum interference necessary to prevent the patient from behaving violently or being a danger to himself or others⁸.

1 Ie the Mental Health Act 1983 ss 57-58: see PARAS 554-555 ante.

2 Treatment may accordingly be given without consent under *ibid* s 63 to the patients to whom that provision applies (see PARAS 551, 553 ante) or in certain circumstances under the common law (see PARA 553 ante).

3 *Ibid* s 62(1)(a). For the meaning of 'patient' see PARA 435 ante. As to the effect of the Mental Capacity Act 2005 on the Mental Health Act 1983 Pt IV (ss 56-64) (as amended) see PARA 559 post.

4 Treatment is irreversible if it has unfavourable irreversible physical or psychological consequences: *ibid* s 62(3).

5 *Ibid* s 62(1)(b).

6 See note 4 *supra*.

7 Treatment is hazardous if it entails significant physical hazard: Mental Health Act 1983 s 62(3).

8 *Ibid* s 62(1)(c), (d). A withdrawal of consent or a notice of discontinuance of treatment (see PARA 558 post) does not preclude the continuation of any treatment or plan pending compliance with ss 57, 58 (see PARAS 554-555 ante) if the responsible medical officer considers that the discontinuance of the treatment or of treatment under the plan would cause serious suffering to the patient: s 62(2). For the meaning of 'responsible medical officer' see PARA 553 note 8 ante.

See *B v Croydon Health Authority* [1995] 1 All ER 683, [1995] 1 FCR 662, (1994) 22 BMLR 13, CA (tube feeding, to alleviate symptoms of mental disorder in the form of refusal to eat in order to inflict self-harm, was held to be as much part of the treatment for the disorder as the treatment to remedy its underlying cause).

UPDATE

557 Urgent treatment

TEXT AND NOTES--Mental Health Act 1983 s 62(1A)-(1C) added, s 62(2) amended to take account of electro-convulsive therapy or other forms of treatment specified in regulations under s 58A (see PARA 555): Mental Health Act 2007 s 28(6), (7).

NOTE 8--Reference to responsible medical officer now to approved clinician in charge of the treatment: Mental Health Act 1983 s 62(2) (amended by Mental Health Act 2007 s 12(5)).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(15) CONSENT TO TREATMENT/558. Review of treatment.

558. Review of treatment.

Where a patient¹ is given treatment², a report on it and the patient's condition must be given by the responsible medical officer³ to the Mental Health Act Commission⁴ on the next occasion on which he furnishes a report for renewal of authority for detention⁵ and at any other time if so required by the Commission⁶. Special provision is made in respect of restricted patients⁷. The Commission may at any time give notice to the responsible medical officer directing that, except in cases of urgent treatment⁸, a certificate⁹ in respect of a patient no longer applies¹⁰.

1 For the meaning of 'patient' see PARA 435 ante.

2 I.e. treatment in accordance with the Mental Health Act 1983 s 57(2) (see PARA 554 ante) or s 58(3)(b) (see PARA 555 ante).

3 For the meaning of 'responsible medical officer' see PARA 553 note 8 ante.

4 I.e. acting on behalf of the Secretary of State: see the Mental Health Act 1983 s 61 (as amended: see note 5 infra), s 121(2)(b); and the Mental Health Act Commission (Establishment and Constitution) Order 1983, SI 1983/892 (amended by 1998/1577). As to the constitution and functions of the Mental Health Act Commission see PARA 413 ante. As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

5 I.e. a report under the Mental Health Act 1983 s 20(3) (see PARA 520 ante) or s 21B(2) (as added) (see PARA 521 ante): s 61(1)(a) (amended by the Mental Health (Patients in the Community) Act 1995 s 2(5)). As to the effect of the Mental Capacity Act 2005 on the Mental Health Act 1983 Pt IV (ss 56-64) (as amended) see PARA 559 post.

6 Ibid s 61(1)(b).

7 In relation to a patient subject to a restriction order or direction (see PARA 496 ante) or a limitation direction (see PARA 490 ante), a report must be made: (1) in the case of treatment in the period of six months beginning with the date of the restriction order or direction or limitation direction, at the end of that period; (2) in the case of treatment at any subsequent time, on the next occasion on which the officer furnishes a report under ibid s 41(6), s 45B(3) (as added) or s 49(3) (see PARAS 490, 501 ante): s 61(2) (amended by the Crime (Sentences) Act 1997 s 55, Sch 4 para 12(7)).

8 See the Mental Health Act 1983 s 62; and PARA 557 ante.

9 I.e. a certificate under ibid s 57(2) or s 58(3)(b): see PARAS 554-555 ante.

10 Ibid s 61(3).

UPDATE

558 Review of treatment

TEXT AND NOTES--Reference to the Mental Health Act Commission is now to the Care Quality Commission (see PARA 413): Mental Health Act 1983 s 61(1), (3) (s 61(1) further amended, s 61(3) amended, by Health and Social Care Act 2008 s 52(1), Sch 3 para 4).

NOTE 2--Or treatment in accordance with the Mental Health Act 1983 s 58A(4) or (5) or by virtue of s 62A in accordance with a Pt 4A certificate: 1983 Act s 61(1) (amended by Mental Health Act 2007 s 28(5)).

TEXT AND NOTE 3--Reference to the responsible medical officer is now to the approved clinician in charge of the treatment: Mental Health Act 1983 s 61(1) (amended by Mental Health Act 2007 ss 12(4)(a), 34(3)).

NOTE 4--Mental Health Act 1983 s 121(2)(b) amended: Mental Health Act 2007 s 35(3). SI 1983/892 revoked: Health and Social Care Act 2008 Sch 15 Pt 1.

TEXT AND NOTE 10--Reference to responsible medical officer omitted: Mental Health Act 1983 s 61(3) (amended by Mental Health Act 2007 s 12(4)(c)). The notice must be given to the approved clinician in charge of the treatment: Mental Health Act 1983 s 61(3A) (added by Mental Health Act 2007 s 12(4)(c)).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/3. CARE AND TREATMENT OF PATIENTS/(15) CONSENT TO TREATMENT/559. Effect of the Mental Capacity Act 2005.

559. Effect of the Mental Capacity Act 2005.

Once the Mental Capacity Act 2005 comes into effect¹, it will not authorise anyone to give a patient medical treatment for mental disorder² or to consent to a patient's being given medical treatment for mental disorder, if, at the time when it is proposed to treat the patient, his treatment is regulated by Part IV of the Mental Health Act 1983³. Thus there will be a separate regime for the treatment of incapacitated adults subject to Part IV of that Act⁴. The common law relating to consent to treatment and a patient's best interests⁵ will be codified by the Mental Capacity Act 2005⁶.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 For the meaning of 'medical treatment' see PARA 552 ante; for the meaning of 'mental disorder' see PARA 402 ante; and for the meaning of 'patient' see PARA 435 ante (definitions applied by *ibid* s 28(2)).

3 See *ibid* s 28(1); and PARA 657 post. The reference in the text is a reference to the Mental Health Act 1983 Pt IV (ss 56-64) (as amended) (see PARAS 551-558 ante). As to the treatment of incapacitated adults under the Mental Capacity Act 2005 see PARA 641 et seq post.

4 See PARAS 551 et seq ante, 612-613 post.

5 See PARAS 612-613 post.

6 See PARA 595 post.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(1) CONSTITUTION/560. Constitution of tribunals.

4. MENTAL HEALTH REVIEW TRIBUNALS

(1) CONSTITUTION

560. Constitution of tribunals.

A mental health review tribunal must be constituted for each region of England¹, with one tribunal for Wales². The Secretary of State³ may by order determine the regions in England, and may vary a determined region; and he must act to secure that the regions together comprise the whole of England⁴.

1 For the meaning of 'England' see PARA 405 note 6 ante.

2 Mental Health Act 1983 s 65(1), (1A) (s 65(1) substituted, and s 65(1A), (1B) added, by the Health Authorities Act 1995 s 2(1), Sch 1 para 107(6)). For the meaning of 'Wales' see PARA 405 note 7 ante.

3 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

4 Mental Health Act 1983 s 65(1B) (as added: see note 2 supra). As from 29 September 2003 there are two tribunal regions in England, the northern region and the southern region: see the Mental Health Review Tribunals (Regions) Order 2003, SI 2003/2251.

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

560-562 Constitution of tribunals ... Remuneration, staff and accommodation

The Mental Health Act 1983 s 65 (amended by Mental Health Act 2007 s 38(2); and SI 2008/2833) makes provision in relation to the Mental Health Review Tribunal for Wales.

560 Constitution of tribunals

NOTE 4--SI 2003/2251 revoked: SI 2008/2683.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(1) CONSTITUTION/561. Membership.

561. Membership.

Each of the mental health review tribunals consists of: (1) legal members appointed by the Lord Chancellor¹ who have such legal experience as he considers suitable²; (2) medical members appointed by the Lord Chancellor, after consultation with the Secretary of State³; and (3) such other persons appointed by the Lord Chancellor, after consultation with the Secretary of State, who have such experience in administration, knowledge of social services or other qualifications or experience as the Lord Chancellor considers suitable⁴.

Members hold and vacate office under the terms of the instrument under which they are appointed, but may resign by notice in writing to the Lord Chancellor. Any member who ceases to hold office is eligible for re-appointment⁵. The Lord Chancellor appoints a legal member of each tribunal as chairman of the tribunal⁶.

Subject to rules restricting the persons qualified to serve as members of a tribunal for the consideration of any application, or any application of a particular class⁷, the members who are to constitute a tribunal for the purpose of any proceedings or class or group of proceedings must be appointed by the chairman⁸; and of these at least one must be a legal member, one a medical member, and one neither legal nor medical⁹. The jurisdiction of a tribunal may be exercised by any three or more of its members¹⁰. Where the chairman himself is included among the persons so appointed, he will¹¹ be president of that tribunal; and in any other case the chairman must nominate another legal member from those so appointed to be president¹². A member of one tribunal may be appointed as one of the persons to constitute another tribunal for the purposes of any proceedings or class or group of proceedings; and in relation to such proceedings he is deemed to be a member of that tribunal¹³.

Members of a mental health review tribunal are disqualified for membership of the House of Commons¹⁴.

1 As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

2 Mental Health Act 1983 s 65(2), Sch 2 para 1(a). The Council on Tribunals has power to make recommendations as to the appointment of members, and regard must be had to such recommendations: see the Tribunals and Inquiries Act 1992 s 5 (as amended); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 14.

3 Mental Health Act 1983 Sch 2 para 1(b). See note 2 supra. In relation to Wales, the function of the Lord Chancellor under the Mental Health Act 1983 Sch 2 para 1(b), (c) (see heads (2), (3) in the text) is exercisable only after consultation with the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 5, Sch 2; and PARA 411 ante. As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante. As from a day or days to be appointed, the requirement for the Lord Chancellor to consult with the Secretary of State is repealed (see the Mental Health Act 1983 Sch 2 para 1(b) (prospectively amended by the Constitutional Reform Act 2005 ss 15(1), 146, Sch 4 Pt 1 paras 150, 158, Sch 18 Pt 2)); and as part of the selection process for an appointment the Judicial Appointments Commission must consult the Secretary of State (see the Mental Health Act 1983 Sch 2 para 1A (prospectively added by the Constitutional Reform Act 2005 ss 15(1), 146, Sch 4 Pt 1 paras 150, 158, Sch 18 Pt 2)). At the date at which this volume states the law no such day or days had been appointed.

As to the medical member's duty to examine the patient prior to the tribunal hearing and to form an opinion about the patient's mental condition see PARA 583 post.

4 Mental Health Act 1983 Sch 2 para 1(c). See note 2 supra. As from a day or days to be appointed, the requirement for the Lord Chancellor to consult with the Secretary of State is repealed (see Sch 2 para 1(c) (prospectively amended by the Constitutional Reform Act 2005 ss 15(1), 146, Sch 4 Pt 1 paras 150, 158, Sch 18 Pt 2)); and as part of the selection process for an appointment the Judicial Appointments Commission must

consult the Secretary of State (see the Mental Health Act 1983 Sch 2 para 1A (prospectively added: see note 3 supra)). At the date at which this volume states the law no such day or days had been appointed.

5 Ibid Sch 2 para 2 (amended by the Judicial Pensions and Retirement Act 1993 s 26, Sch 6 para 40). However, a member must vacate office on the day he attains the age of 70 (subject to the Judicial Pensions and Retirement Act 1993 s 26(4)-(6): see COURTS vol 10 (Reissue) PARA 535); Mental Health Act 1983 Sch 2 para 2A (added by the Judicial Pensions and Retirement Act 1993 Sch 6 para 40).

6 Mental Health Act 1983 Sch 2 para 3.

7 See *ibid* s 78(2)(c); and the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 8(1), (2) (amended by SI 1996/314; SI 2002/2469; SI 2004/696). A person is not qualified to serve as a member to consider an application or reference if he has an interest in the patient, or is a member or officer of the responsible authority or of the registration authority concerned in the proceedings, or a member or officer of a health authority or primary care trust or NHS trust or NHS foundation trust which has a right to discharge a patient under the Mental Health Act 1983 s 23(3) (as amended) (see PARA 523 ante), or he has a personal connection with the patient or has recently treated the patient in a professional medical capacity: Mental Health Review Tribunal Rules 1983, SI 1983/942, r 8(2) (amended by SI 1996/314; SI 2002/2469; SI 2004/696). Only a legal member approved by the Lord Chancellor for that purpose may serve as president of a tribunal for the consideration of an application or reference relating to a restricted patient: Mental Health Act 1983 s 78(4)(a); Mental Health Review Tribunal Rules 1983, SI 1983/942, r 8(3). For the meaning of 'patient' see PARA 435 ante. For the meanings of 'health authority' and 'primary care trust' see PARA 414 note 6 ante. As to NHS trusts and NHS foundation trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq.

A president of a tribunal who has sat on the case of a restricted patient may sit on a later application by the same patient: *R v Oxford Regional Mental Health Review Tribunal, ex p Mackman* (1986) Times, 2 June. See also *R (on the application of D) v West Midlands and North West Mental Health Review Tribunal* [2004] EWCA Civ 311, [2004] All ER (D) 339 (Mar) (allegation of bias where medical member was employed by hospital trust responsible for the detention of the applicant patient).

8 If the chairman is unable to act, the appointments must be made by another member of the tribunal appointed for the purpose by the chairman: Mental Health Act 1983 Sch 2 para 4. At any time up to the hearing the chairman may exercise the powers of the tribunal regarding matters preliminary or incidental to the hearing: Mental Health Review Tribunal Rules 1983, SI 1983/942, r 5.

9 Mental Health Act 1983 Sch 2 para 4.

10 See *ibid* s 65(3). The provision is subject to compliance with Sch 2 (as amended) and any rules made by the Lord Chancellor: s 65(2). See in particular the text and notes 7-9 supra.

11 *Ie* subject to any rules made by the Lord Chancellor under *ibid* s 78(4)(a), restricting the persons qualified to serve as president of a tribunal considering an application or reference relating to a restricted patient. See the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 8(3); and note 7 supra.

12 Mental Health Act 1983 Sch 2 para 6.

13 *Ibid* Sch 2 para 5.

14 See the House of Commons Disqualification Act 1975 s 1(1)(f), Sch 1 Pt II (amended by the Mental Health Act 1983 s 148(1), Sch 4 para 42); and PARLIAMENT vol 78 (2010) PARA 908.

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

560-562 Constitution of tribunals ... Remuneration, staff and accommodation

The Mental Health Act 1983 s 65 (amended by Mental Health Act 2007 s 38(2); and SI 2008/2833) makes provision in relation to the Mental Health Review Tribunal for Wales.

561 Membership

TEXT AND NOTES--See also Constitutional Reform Act 2005 s 85, Sch 14 Pt 3; and COURTS vol 10 (Reissue) PARA 515B.18.

See further s 19, Sch 7 para 4 (protected functions of the Lord Chancellor); and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 489A.1.

NOTES 3, 4--Day appointed is 3 April 2006: SI 2006/1014.

TEXT AND NOTE 6--Revoked: SI 2008/2833.

NOTES 7, 8, 11--SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705.

NOTE 7--In relation to Wales, references to a health authority are to be treated as references to a local health board: see References to Health Authorities Order 2007, SI 2007/961.

NOTES 9, 12--Mental Health Act 1983 Sch 2 paras 4, 6 amended: Mental Health Act 2007 s 38(7), (9).

NOTE 13--Mental Health Act 1983 Sch 2 para 5 revoked by SI 2008/2833 and replaced by SI 2009/1307.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(1) CONSTITUTION/562. Remuneration, staff and accommodation.

562. Remuneration, staff and accommodation.

The Secretary of State¹ may pay to members of mental health review tribunals such remuneration and allowances, and may defray the expenses of tribunals to such extent, as he may with the consent of the Minister for the Civil Service determine². He may also, with the like consent, provide for each such tribunal such officers, staff and accommodation as it may require³.

1 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

2 Mental Health Act 1983 s 65(4). As to the Minister for the Civil Service see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 427, 550.

3 Ibid s 65(4).

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

560-562 Constitution of tribunals ... Remuneration, staff and accommodation

The Mental Health Act 1983 s 65 (amended by Mental Health Act 2007 s 38(2); and SI 2008/2833) makes provision in relation to the Mental Health Review Tribunal for Wales.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(2) APPLICATIONS AND REFERENCES/563. Right to make applications.

(2) APPLICATIONS AND REFERENCES

563. Right to make applications.

Applications to a mental health review tribunal by or on behalf of a patient¹ may only be made in such cases and at such times as are expressly authorised²; and, where an application is so authorised to be made within a specified period, only one such application may be made within that period³, but disregarding any application which is withdrawn in accordance with the rules⁴.

1 For the meaning of 'patient' see PARA 435 ante.

2 Mental Health Act 1983 s 77(1). See PARAS 564-565 post.

3 Ibid s 77(1), (2).

4 Ibid s 77(2). The rules referred to in the text are rules made under s 78 (as amended) (see PARAS 576 et seq, 588 post). For rules as to withdrawal of applications see PARA 578 post.

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

563 Right to make applications

NOTE 4--Mental Health Act 1983 s 77(2) amended: SI 2009/1307.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(2) APPLICATIONS AND REFERENCES/564. Cases in which applications may be made.

564. Cases in which applications may be made.

The right to apply to a tribunal differs according to whether the patient¹ is compulsorily detained or subject to guardianship under Part II of the Mental Health Act 1983², or detained as a criminal offender under Part III³, and in the latter case according to whether or not the patient is a restricted patient for this purpose.

In regard to Part II patients an application to a mental health review tribunal may be made by the following persons ('applicants') within the specified periods:

- 73 (1) by a patient who is admitted to hospital⁴ in pursuance of an application for admission for assessment⁵, within 14 days of admission⁶;
- 74 (2) by a patient who is admitted to hospital in pursuance of an application for treatment⁷, within six months of admission⁸;
- 75 (3) by a patient received into guardianship in pursuance of a guardianship application⁹, within six months of acceptance of the application¹⁰;
- 76 (4) by a patient or his nearest relative¹¹ where a report has been furnished for reclassification of the patient¹², within 28 days of the applicant's being informed that the report has been furnished¹³;
- 77 (5) by a patient having been transferred from guardianship to hospital¹⁴, within six months of the transfer¹⁵;
- 78 (6) by a patient where a report has been furnished for renewal of his detention or guardianship¹⁶ and he has not been discharged, within the period for which authority for detention or guardianship has been renewed by virtue of the report¹⁷;
- 79 (7) by a patient where a report is furnished when the patient returns to hospital or the place where he should be¹⁸ and he would have ceased to be liable to be detained or subject to guardianship on or before the day on which the report is furnished¹⁹ or where he would have ceased to be liable to be detained or subject to guardianship on or before the day on which the report is furnished and renewed authority for his detention or guardianship expires on or before the day on which the report is furnished²⁰, within the period for which authority for detention or guardianship has been renewed by virtue of the report²¹;
- 80 (8) by a patient where a report is furnished when the patient returns to hospital or the place where he should be²² and where the form of mental disorder²³ specified in the report is a form other than that specified in the application for the patient's admission for treatment or the guardianship application²⁴, within 28 days of the applicant's being informed that the report has been furnished²⁵;
- 81 (9) by a patient's nearest relative²⁶ where a report barring discharge by the nearest relative has been furnished²⁷ in respect of a patient detained in pursuance of an application for admission for treatment, within 28 days of the applicant's being informed that the report has been furnished²⁸;
- 82 (10) by a patient or his nearest relative if he has been informed under the Mental Health Act 1983 that a supervision application²⁹ has been accepted in respect of the patient, within six months of the day on which the application is accepted³⁰;
- 83 (11) by a patient who is subject to after-care under supervision or his nearest relative³¹ if he has been informed under the Mental Health Act 1983 that a report has been furnished for the reclassification of the patient³², within 28 days of being informed that the report has been furnished³³;

- 84 (12) by a patient or his nearest relative³⁴ if he has been informed under the Mental Health Act 1983 that a report has been furnished in respect of the patient as to the duration and renewal of an order or direction for after-care under supervision³⁵, within the further period for which the patient is made subject to after-care under supervision by virtue of the report³⁶;
- 85 (13) by a patient's nearest relative³⁷ where an order has been made³⁸ appointing an acting nearest relative in respect of a patient who is, or who subsequently becomes, liable to be detained or subject to guardianship, within 12 months beginning with the date of the order and in any subsequent 12 months during which the order continues in force³⁹.

Part III patients (that is, criminal offenders) who are admitted to hospital in pursuance of a hospital order⁴⁰ without a restriction order⁴¹ or who are placed under guardianship by a guardianship order⁴², and who thus fall to be treated as Part II patients for certain purposes⁴³, have the same rights of application to a tribunal as Part II patients under heads (4), (5) and (6) above⁴⁴.

An application to a tribunal may also be made by the following persons ('applicants') within the specified periods:

- 86 (a) by the nearest relative⁴⁵ of a patient admitted in pursuance of a hospital order⁴⁶, in the period between the expiry of six months and the expiry of 12 months beginning with the date of the order, and in any subsequent period of 12 months⁴⁷;
- 87 (b) by a patient placed under guardianship by a guardianship order⁴⁸, within six months beginning with the date of the order⁴⁹;
- 88 (c) by the nearest relative⁵⁰ of a patient placed under guardianship by a guardianship order⁵¹, within 12 months beginning with the date of the order, and in any subsequent period of 12 months⁵²;
- 89 (d) by a patient who is treated as subject to a hospital order or transfer direction, either when a restriction order ceases to have effect while a hospital order remains in force, or when he is transferred to a hospital in England and Wales⁵³ from Northern Ireland, the Channel Islands, the Isle of Man or Scotland, or when an order for his admission to hospital is made following a special verdict or findings that he is under a disability⁵⁴, within six months beginning with the date of the order or direction⁵⁵;
- 90 (e) by a patient who is subject to a direction transferring him to hospital⁵⁶, within six months beginning with the date of the direction⁵⁷;
- 91 (f) by a restricted patient⁵⁸ detained in hospital, in the period between the expiry of six months and the expiry of 12 months beginning with the date of the relevant hospital order, hospital direction or transfer direction, and in any subsequent period of 12 months⁵⁹;
- 92 (g) by a conditionally discharged⁶⁰ restricted patient who has not been recalled to hospital, in the period between the expiry of 12 months and the expiry of two years beginning with the date on which he was conditionally discharged, and in any subsequent period of two years⁶¹.

1 For the meaning of 'patient' see PARA 435 ante.

2 Ie the Mental Health Act 1983 Pt II (ss 2-34) (as amended).

3 Ie ibid Pt III (ss 35-55) (as amended).

4 For the purposes of ibid Pt V (ss 65-79) (as amended), unless the context otherwise requires, 'hospital' means a hospital as defined in PARA 417 ante: s 79(6).

5 le under *ibid* s 2: see PARA 460 ante. See *R (on the application of MH) v Secretary of State for Health* [2005] UKHL 60, [2005] All ER (D) 218 (Oct); and PARA 456 note 23 ante.

6 Mental Health Act 1983 s 66(1)(a), (i), (2)(a). If the patient's status changes to s 3 (admission for treatment: see PARA 461 ante) before an application under s 2 (admission for assessment: see PARA 460 ante) is heard he does not lose his right to a hearing using the discharge criteria for s 3 under s 72(1)(b) (as substituted) (see PARA 569 post); he can still make an application to a mental health review tribunal under s 66(1)(b), (i), (2)(b) (see head (2) in the text) if unsuccessful: see *R v Mental Health Review Tribunal for the South Thames Region, ex p Smith* (1998) 47 BMLR 104.

7 le under the Mental Health Act 1983 s 3: see PARA 461 ante.

8 *Ibid* s 66(1)(b), (i), (2)(b). See note 6 supra.

9 le under *ibid* s 7: see PARA 469 ante.

10 *Ibid* s 66(1)(c), (i), (2)(c).

11 For the meaning of 'nearest relative' see PARA 453 ante.

12 le under the Mental Health Act 1983 s 16: see PARA 527 ante.

13 *Ibid* s 66(1)(d), (i), (ii), (2)(d) (s 66(1)(i) amended by the Mental Health (Patients in the Community) Act 1995 ss 1(2), 2(6)(a), Sch 1 para 7(2), (3)).

14 le in pursuance of regulations made under the Mental Health Act 1983 s 19 (as amended): see PARA 514 ante.

15 *Ibid* s 66(1)(e), (i), (2)(e).

16 le pursuant to *ibid* s 20: see PARAS 519-520 ante.

17 *Ibid* s 66(1)(f), (i), (2)(f).

18 le under *ibid* s 21B(2) (as added): see PARA 521 ante.

19 le *ibid* s 21B(5) (as added) applies: see PARA 521 ante.

20 le under *ibid* s 21B(5), (6)(b) (as added): see PARA 521 ante.

21 *Ibid* s 66(1)(fa), (i), (2)(f) (amended by the Mental Health (Patients in the Community) Act 1995 Act s 2(6)).

22 le under the Mental Health Act 1983 s 21B(2) (as added): see PARA 521 ante.

23 For the meaning of 'mental disorder' see PARA 402 ante.

24 le under the Mental Health Act 1983 s 21B(8) (as added): see PARA 521 ante.

25 *Ibid* s 66(1)(fb), (i), 2(d) (amended by the Mental Health (Patients in the Community) Act 1995 s 2(6)).

26 See note 11 supra.

27 le pursuant to the Mental Health Act 1983 s 25: see PARA 525 ante.

28 *Ibid* s 66(1)(g), (ii), (2)(d) (amended by the Mental Health (Patients in the Community) Act 1995 s 2(6)).

29 le under the Mental Health Act 1983 s 25A (as added): see PARA 528 ante.

30 *Ibid* s 66(1)(ga), (i), (2)(c) (amended by the Mental Health (Patients in the Community) Act 1995 Sch 1 para 7).

31 See note 11 supra.

32 le under the Mental Health Act 1983 s 25F (as added and amended): see PARA 531 ante.

33 *Ibid* s 66(1)(gb), (i), (2)(d) (amended by the Mental Health (Patients in the Community) Act 1995 Sch 1 para 7).

34 See note 11 *supra*.

35 *Ie* under the Mental Health Act 1983 s 25G (as added): see PARA 532 *ante*.

36 *Ibid* s 66(1)(gc), (i), (2)(fa) (amended by the Mental Health (Patients in the Community) Act 1995 Sch 1 para 7).

37 See note 11 *supra*.

38 *Ie* pursuant to the Mental Health Act 1983 s 29: see PARA 456 *ante*.

39 *Ibid* s 66(1)(h), (ii), (2)(g).

40 *Ie* under *ibid* s 37: see PARA 491 *ante*.

41 *Ie* under *ibid* s 41(1): see PARA 496 *ante*.

42 *Ie* under *ibid* s 37: see PARA 502 *ante*.

43 See *ibid* s 40(4).

44 *Ibid* s 40(4), Sch 1 Pt I para 9 (amended by the Mental Health (Patients in the Community) Act 1995 Sch 1 para 14).

45 See note 11 *supra*.

46 *Ie* under the Mental Health Act 1983 s 37: see PARA 491 *ante*.

47 *Ibid* s 69(1)(a).

48 *Ie* under *ibid* s 37: see PARA 502 *ante*.

49 *Ibid* s 69(1)(b)(i).

50 See note 11 *supra*.

51 *Ie* under the Mental Health Act 1983 s 37: see PARA 502 *ante*.

52 *Ibid* s 69(1)(b)(ii).

53 For the meaning of 'England' see PARA 405 note 6 *ante*. For the meaning of 'Wales' see PARA 405 note 7 *ante*.

54 *Ie* by virtue of the Mental Health Act 1983 s 41(5) (see PARA 497 *ante*), s 82(2) (as amended) (see PARA 545 *ante*), s 85(2) (see PARA 546 *ante*) or the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 2(2) (see PARA 543 *ante*).

55 Mental Health Act 1983 s 69(2)(a) (amended by the Domestic Violence, Crime and Victims Act 2004 s 58, Sch 10 para 19, Sch 11; and the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 15, Sch 1 para 2(1), (2)).

56 *Ie* by virtue of the Mental Health Act 1983 s 45B(2) (as added) (see PARA 490 *ante*), s 47(3) (see PARA 535 *ante*), s 48(3) (see PARA 536 *ante*).

57 *Ibid* s 69(2)(b) (amended by the Crime (Sentences) Act 1997 s 55, Sch 4 para 12(8)).

58 For the purposes of the Mental Health Act 1983 Pt V (ss 65-79) (as amended), 'restricted patient' means a patient: (1) subject to a restriction order or limitation direction (see PARA 496 *ante*); (2) subject to a restriction direction (see PARA 537 *ante*); (3) subject to a hospital order and a restriction order by virtue of any enactment; or (4) treated as subject to a hospital order and a restriction order or to a transfer direction and a restriction direction by virtue of the Mental Health Act 1983 s 82(2) (as amended), s 85(2) or the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 2(2) (see PARA 543 *et seq ante*): Mental Health Act 1983 s 79(1) (amended by the Crime (Sentences) Act 1997 s 55, Sch 4 para 12(14); the Domestic Violence, Crime and Victims Act 2004 Sch 10 para 21, Sch 11; and the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), Sch 1 para 2(1), (2)).

59 Mental Health Act 1983 s 70 (amended by the Crime (Sentences) Act 1997 Sch 4 para 12(9)). Where a conditionally discharged restricted patient is recalled to hospital, this applies to him as if the relevant hospital order, hospital direction or transfer direction had been made on the day on which he returned or was returned to hospital: Mental Health Act 1983 s 75(1)(b) (amended by the Crime (Sentences) Act 1997 Sch 4 para 12(13)).

60 As to conditional discharge of restricted patients see PARA 524 ante.

61 Mental Health Act 1983 s 75(2).

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

564 Cases in which applications may be made

TEXT AND NOTES 1-39--These provisions as applied by the Mental Health Act 1983 s 40(4) are subject to s 69(4): s 69(3) (s 69(3)-(5) added by Mental Health Act 2007 Sch 3 para 20(c)).

TEXT AND NOTES 4-39--Heads (4), (8), (10)-(12) omitted; and new heads (14) by a patient in respect of whom a community treatment order is made, within six months of the day on which the order is made; (15) by a patient in respect of whom a community treatment order is revoked under the Mental Health Act 1983 s 17F (see PARA 528A), within six months of the day on which the order is revoked; (16) by a patient in respect of whom a report is furnished under s 20A and the patient is not discharged under s 23, within the period or periods for which the community treatment period is extended by virtue of the report; (17) by a community patient in respect of whom a report is furnished under s 21B(2) in respect of a community patient and s 21B(6A) (or s 21B(6A), (6B)(b) applies) in the case of the report, within the period or periods for which the community treatment period is extended by virtue of the report: s 66(1)(ca), (cb), (fza), (faa), (2)(ca), (cb), (fza) (added by Mental Health Act 2007 Sch 3 para 18(2) (a), (c), (d), (3)).

TEXT AND NOTES 7, 8--Nothing in head (2) entitles a community patient to make an application by virtue of the Mental Health Act 1983 s 66(1)(b) even if he is admitted to a hospital on being recalled there under s 17E: s 66(2A) (added by Mental Health Act 2007 Sch 3 para 18(4)).

NOTES 8, 30--An application under the Mental Health Act 1983 s 66(1)(b) may not be continued if the patient becomes subject to supervised discharge; a fresh application under s 66(1)(ga) must be made: *R (on the application of SR) v Mental Health Review Tribunal* [2005] EWHC 2923 (Admin), (2006) 87 BMLR 132.

NOTE 13--Mental Health Act 1983 s 66(2)(d) amended: Mental Health Act 1983 Sch 1 para 13.

TEXT AND NOTES 16, 17--Head (6) amended to refer to the patient's discharge under the Mental Health Act 1983 s 23 (see PARA 523): s 66(1)(f) (amended by Mental Health Act 2007 Sch 3 para 18(2)(b)).

TEXT AND NOTES 26-28--Head (9) amended to apply also to a community patient: Mental Health Act 1983 s 66(1)(g) (amended by Mental Health Act 2007 Sch 3 para 18(2)(e)).

TEXT AND NOTES 37-39--Head (13) amended to apply also to a community patient: Mental Health Act 1983 s 66(1)(h) (amended by Mental Health Act 2007 Sch 3 para 18(2)(f)).

TEXT AND NOTES 45-47--Now, head (a) by the nearest relative of a patient liable to be detained in pursuance of a hospital order or a community patient who was so liable immediately before he became a community patient, in any period in which an application may be made by the patient under any such provision as applied by s 40(4): Mental Health Act 1983 s 69(1)(a) (substituted by Mental Health Act 2007 Sch 3 para 20(a)).

TEXT AND NOTES 53-55--Head (d). Mental Health Act 1983 s 69(2)(a) further amended: Mental Health Act 2007 Sch 5 para 18.

NOTES 56, 57--Reference to Mental Health Act 1983 s 45B(2) omitted: s 69(2)(b) (amended by Mental Health Act 2007 Sch 3 para 20(b)).

NOTE 58--Mental Health Act 1983 s 79(1) further amended: Mental Health Act 2007 Sch 5 para 19(2).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(2) APPLICATIONS AND REFERENCES/565. Applications where patients are transferred from other parts of the United Kingdom.

565. Applications where patients are transferred from other parts of the United Kingdom.

Patients liable to be detained under the Mental Health (Care and Treatment) (Scotland) Act 2003 or the Criminal Procedure (Scotland) Act 1995, who are removed to hospital in England or Wales¹ on ministerial authority², are treated as if they had been admitted to hospital under the corresponding provisions of the Mental Health Act 1983³. Accordingly, they have the same rights of application to a mental health review tribunal⁴. The same applies with regard to patients removed from Northern Ireland, the Channel Islands or the Isle of Man to hospital or guardianship in England or Wales⁵.

1 For the meaning of 'England' see PARA 405 note 6 ante. For the meaning of 'Wales' see PARA 405 note 7 ante.

2 See the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 2; and PARA 543 ante.

3 See *ibid* art 2(2); and PARA 543 ante.

4 It is in effect the rights of those from other parts of the United Kingdom admitted to hospital by virtue of an application for admission for assessment or for treatment or (except in relation to Scotland) received into guardianship by virtue of a guardianship application or a guardianship order, as the case may be (see PARA 564 heads (1), (2), (3), (b) ante), together with any other rights which may become applicable. Patients subject to hospital orders, with or without restriction orders, do not by virtue of this provision have the right to apply within the first six months of the transfer, but they are expressly given such a right by the Mental Health Act 1983 s 69(2)(a) (as amended) (see PARA 564 head (d) ante).

5 See *ibid* ss 82, 85 (as amended); and PARAS 545-546 ante.

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(2) APPLICATIONS AND REFERENCES/566. Visiting and examination of patients.

566. Visiting and examination of patients.

For the purpose of advising whether an application to a mental health review tribunal should be made by or in respect of a patient¹ who is liable to be detained or subject to guardianship or after-care under supervision (or, if he has not yet left hospital, is to be subject to after-care supervision after he leaves hospital)², or of furnishing information for the purposes of such an application³, any registered medical practitioner⁴ authorised by or on behalf of the patient or other person who is entitled to make, or has made, the application may at any reasonable time visit the patient and examine him in private, and may require production of and inspect any records relating to the detention and treatment of the patient in any hospital or relating to any after-care services provided for the patient⁵. Equivalent provision is made for the purpose of furnishing information for the purpose of any reference to a tribunal by the hospital managers⁶ or by the Secretary of State⁷.

1 For the meaning of 'patient' see PARA 435 ante.

2 I.e. under the Mental Health Act 1983 Pt II (ss 2-34) (as amended). For the meaning of 'hospital' for these purposes see PARA 564 note 4 ante; and see also PARA 417 ante. Section 76 (as amended) also applies to patients subject to hospital and guardianship orders, restriction orders, transfer directions and other orders or directions having the same effect, by virtue of s 40(4), s 41(3) (as amended), s 41(5), 55(4), Sch 1 Pt I para 1 (as amended), Sch 1 Pt II para 1 (see PARAS 487-488 ante).

3 Although the doctor is instructed by or on behalf of the patient, the public and private interest in maintaining the confidentiality of communications between them must be balanced against the public interest in limited disclosure of information vital to the protection of the public; hence an independent psychiatrist instructed to prepare a report with a view to a tribunal application by a restricted patient who had shot and killed five people and wounded two others was justified in sending his report to the responsible authority: *W v Egde* [1990] Ch 359, [1990] 1 All ER 835, CA.

4 For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.

5 Mental Health Act 1983 s 76(1) (amended by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 11). The after-care services are provided under the Mental Health Act 1983 s 117 (as amended); see PARA 428 ante. Section 32 (as amended) (making of regulations: see PARA 442 ante) applies for the purposes of s 76 (as amended) as it applies for the purposes of Pt II (as amended): s 76(2).

6 Ibid s 68(3) (amended by the Mental Health (Patients in the Community) Act 1995 Sch 1 para 9). As to such references see PARA 567 post. For the meaning of 'managers' see PARA 439 ante.

7 Mental Health Act 1983 s 67(2) (amended by the Mental Health (Patients in the Community) Act 1995 Sch 1 para 8). As to such references see PARA 568 post. There is no such provision in respect of references relating to restricted patients under the Mental Health Act 1983 s 71 (as amended) (see PARA 568 post). As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

566 Visiting and examination of patients

TEXT AND NOTES 1-5--These provisions apply also to a community patient: Mental Health Act 1983 s 76(1) (amended by Mental Health Act 2007 Sch 3 para 22).

TEXT AND NOTE 4--Now refers to any registered medical practitioner or approved clinician: Mental Health Act 1983 ss 67(2), 76(1) (amended by Mental Health Act 2007 s 13(2)).

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567. Duty of hospital managers to refer cases to tribunals.

Where a patient¹ who is admitted to hospital² in pursuance of an application for admission for treatment³ or a patient who is transferred from guardianship to hospital does not exercise the right⁴ to apply to a mental health review tribunal, the managers⁵ of the hospital must refer the patient's case to a tribunal at the expiration of the period for making such an application⁶. Such a duty is also imposed where authority for the detention of a patient in hospital has been renewed⁷ and a period of three years⁸, or if the patient is under 16 years, one year, has elapsed since the patient's case was considered by a tribunal⁹.

1 For the meaning of 'patient' see PARA 435 ante.

2 For the meaning of 'hospital' for these purposes see PARA 564 note 4 ante; and see also PARA 417 ante.

3 I.e. under the Mental Health Act 1983 s 3 (see PARA 461 ante).

4 I.e. by virtue of *ibid* s 66(1)(b) or (e); see PARA 564 heads (2), (5) ante.

5 For the meaning of 'managers' see PARA 439 ante.

6 Mental Health Act 1983 s 68(1). No such reference may be made, however, if an application has been made under s 66(1)(d), (g), (h) (see PARA 564 heads (4), (9), (13) ante) or a reference has been made under s 67(1) (as amended) (see PARA 568 post). A withdrawn application is to be disregarded for the purposes of s 68(1): s 68(5).

7 I.e. under *ibid* s 20 (see PARA 519 ante) or s 21B (as added) (see PARA 521 ante). Section 20 applies to patients subject to hospital orders without restrictions: see s 40(4), Sch 1 Pt I para 6; and PARA 487 ante.

8 These periods may be varied by order of the Secretary of State: *ibid* s 68(4). As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

9 *Ibid* s 68(2) (amended by the Mental Health (Patients in the Community) Act 1995 ss 1(2), 2(7), Sch 1 para 9).

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

567 Duty of hospital managers to refer cases to tribunals

TEXT AND NOTES--Mental Health Act 1983 s 68 now ss 68, 68A (substituted by Mental Health Act 2007 s 37(3); and amended by SI 2008/2833).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(2) APPLICATIONS AND REFERENCES/568. Powers and duties of Secretary of State to refer cases to tribunals.

568. Powers and duties of Secretary of State to refer cases to tribunals.

The Secretary of State¹ may, if he thinks fit, at any time refer to a mental health review tribunal the case of a patient² who is liable³ to be detained or subject to guardianship or to after-care under supervision⁴.

The Secretary of State may at any time refer the case of a restricted patient⁵ to a tribunal⁶. However, he must refer to a tribunal: (1) any restricted patient detained in a hospital whose case has not been considered by a tribunal, whether on his own application or otherwise, within the last three years⁷; and (2) any conditionally discharged⁸ restricted patient who is recalled to hospital⁹, within one month of the day of which he returns or is returned to hospital¹⁰.

1 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

2 For the meaning of 'patient' see PARA 435 ante.

3 Such liability is under the Mental Health Act 1983 Pt II (ss 2-34) (as amended).

4 Mental Health Act 1983 s 67(1) (amended by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 8). This provision also applies to patients subject to hospital orders without restrictions, guardianship orders, and orders having the same effect: ss 40(4), 55(4), Sch 1 Pt I para 1 (as amended); and see PARA 487 ante. As to independent visiting and examination of the patient see PARA 566 ante.

5 For the meaning of 'restricted patient' see PARA 564 note 58 ante.

6 Mental Health Act 1983 s 71(1). Any such reference relating to a conditionally discharged patient who has not been recalled to hospital must be made to the tribunal for the area in which he resides: s 71(4). For the meaning of 'hospital' for these purposes see PARA 564 note 4 ante; and see also PARA 417 ante.

7 Ibid s 71(2). The Secretary of State may vary this period by order: s 71(3).

8 Ie under ibid s 42(2) (see PARA 524 ante) or ss 73, 74 (as amended) (see PARAS 570-571 post).

9 As to the power of the Secretary of State to recall conditionally discharged patients to hospital see PARA 524 ante.

10 Mental Health Act 1983 s 75(1)(a). This provision was enacted as a direct result of the decision of the European Court of Human Rights in the case of *X v United Kingdom* (1981) 4 EHRR 188, that a person detained following recall to hospital is entitled, under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 5(4) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 127, 132), to take proceedings whereby the lawfulness of his detention may be decided speedily by a court and his release ordered if the detention is not lawful. The provision was examined in *R (on the application of C) v Secretary of State for the Home Department* [2001] EWHC 501 (Admin) (at first instance). In the event of a change of circumstances of a patient given a conditional discharge by a mental health review tribunal, the correct procedure is to invite the tribunal to reconsider its decision: see *R (on the application of C) v Secretary of State for the Home Department* [2002] EWCA Civ 647, (2002) Times, 24 May; *R (on the application of H) v Secretary of State for the Home Department* [2002] EWCA Civ 646, [2003] QB 320.

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in

relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

568 Powers and duties of Secretary of State to refer cases to tribunals

TEXT AND NOTES 1-4--This provision also applies to a community patient: Mental Health Act 1983 s 67(1) (amended by Mental Health Act 2007 Sch 3 para 19).

TEXT AND NOTE 5--See *Practice Direction (First-tier Tribunal: mental health cases)* [2009] PTSR 323; and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A.11.

NOTE 7--Mental Health Act 1983 s 71(3A) added: Mental Health Act s 37(4).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(3) POWERS OF TRIBUNALS/569. Powers to direct discharge of non-restricted hospital patients.

(3) POWERS OF TRIBUNALS

569. Powers to direct discharge of non-restricted hospital patients.

Where an application¹ is made to a mental health review tribunal by or in respect of a patient² liable to be detained³ under the Mental Health Act 1983, the tribunal may in any case direct that the patient be discharged⁴.

Moreover, the tribunal must direct the discharge of a patient liable to be detained for assessment⁵ if not satisfied: (1) that he is then⁶ suffering from mental disorder⁷ or from mental disorder of a nature or degree which warrants his detention in hospital⁸ for assessment (or for assessment followed by medical treatment⁹) for at least a limited period¹⁰; or (2) that his detention is justified in the interests of his own health or safety or with a view to the protection of other persons¹¹. In any other case¹², the tribunal must direct the discharge of a patient if not satisfied: (a) that he is then suffering from mental illness, psychopathic disorder, mental impairment or severe mental impairment¹³ or from any of those forms of disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment¹⁴; or (b) that it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment¹⁵; or (c) in the case of applications made by the nearest relative following the barring of a discharge order¹⁶, that the patient, if released, would be likely to act in a manner dangerous to other persons or to himself¹⁷.

Where the case of a patient detained otherwise than for assessment¹⁸ does not fall within the above conditions¹⁹, the tribunal, in determining whether or not to direct his discharge, must have regard: (i) to the likelihood of medical treatment alleviating or preventing a deterioration of the patient's condition²⁰; and (ii) in the case of a patient suffering from mental illness or severe mental impairment, to the likelihood of the patient, if discharged, being able to care for himself, to obtain the care he needs or to guard himself against serious exploitation²¹.

A direction that a patient be discharged may direct discharge on a future date specified in the direction²². When discharge is not directed the tribunal may, with a view to facilitating his future discharge²³, recommend that he be granted leave of absence or transferred to another hospital or into guardianship and further consider his case²⁴ in the event of such a recommendation not being complied with²⁵.

In addition, where, in the case of an application to a tribunal by or in respect of a patient who is liable to be detained in pursuance of an application for admission for treatment or by virtue of an order or direction for his admission or removal to hospital²⁶, the tribunal does not direct the discharge of the patient²⁷, the tribunal may recommend that the responsible medical officer²⁸ consider whether to make a supervision application²⁹ in respect of the patient, and it may further consider his case in the event of no such application being made³⁰.

1 See PARA 564 ante. The Mental Health Act 1983 s 72(1)-(5) (as amended) applies in relation to references to a tribunal (see PARAS 567-568 ante) as it applies in relation to an application made by or on behalf of a patient: s 72(6).

2 For the meaning of 'patient' see PARA 435 ante.

3 The Mental Health Act 1983 s 72(1) (as substituted) does not apply to a restricted patient, except as provided in ss 73, 74 (as amended) (see PARAS 570-571 post): s 72(7). For the meaning of 'restricted patient' see

PARA 564 note 58 ante. As to the powers of tribunals in relation to restricted patients see PARAS 570-571 post. The expression 'liable to be detained' includes those on leave of absence under s 17 (as amended) (see PARA 506 ante): *Ex p Waldron* [1986] QB 824, sub nom *R v Hallstrom, ex p W* [1985] 3 All ER 775; *R (on the application of Epsom and St Helier NHS Trust) v Mental Health Review Tribunal* [2001] EWHC 101 (Admin), [2001] 1 MHLR 8.

4 Mental Health Act 1983 s 72(1) (substituted by the Mental Health Act 1983 (Remedial) Order 2001, SI 2001/3712, art 3). Thus the patient may be discharged even though the legal grounds for compulsory detention still subsist. 'Discharge' means release from hospital: *Secretary of State for the Home Department v Mental Health Review Tribunal for Mersey Regional Health Authority* [1986] 3 All ER 233, [1986] 1 WLR 1170.

The Mental Health Act 1983 does not empower a tribunal to determine whether the circumstances of a case were such as to render unlawful the detention of a patient: *Ex p Waldron* [1986] QB 824 at 846, sub nom *R v Hallstrom, ex p W* [1985] 3 All ER 775 at 784, CA, per Ackner LJ. The remedy of a patient who by himself or by others alleges that he is unlawfully detained is by way of application to the Queen's Bench Division for a writ of habeas corpus: see *R v Board of Control, ex p Ruddy* [1956] 2 QB 109, [1956] 1 All ER 796, DC; *R v Board of Control, ex p Winterflood* [1938] 1 KB 420, [1937] 4 All ER 163, DC (revsd on other grounds [1938] 2 KB 366, [1938] 2 All ER 463, CA). Alternatively, such a patient may apply for judicial review: see *R v Gardner, ex p L, R v Hallstrom, ex p W* [1986] QB 1090, sub nom *R v Hallstrom, ex p W (No 2)* [1986] 2 All ER 306. See also *R v Wessex Mental Health Review Tribunal, ex p Wiltshire County Council* (1989) Times, 29 August, CA.

The provisions of the Mental Health Act 1983 s 72(1) (as substituted) require a tribunal to discharge an unrestricted patient if it is not satisfied as to any of the criteria in s 72(1)(a)(i), (ii) or (b)(i), (ii), (iii) (as substituted): see heads (1)-(2) and (a)-(c) in the text. See also PARA 524 note 5 ante.

5 Ie under the Mental Health Act 1983 s 2: see PARA 460 ante.

6 Ie at the time of the tribunal hearing. The tribunal is not required to make a decision that will remain accurate indefinitely or for any given period of time: *R (on the application of Von Brandenburg (aka Hanley)) v East London and the City Mental Health NHS Trust* [2003] UKHL 58, [2004] 2 AC 280, [2004] 1 All ER 400. See also *R (on the application of S) v Mental Health Review Tribunal* [2004] EWHC 2958 (Admin), [2004] All ER (D) 87 (Dec); and PARA 506 ante.

7 For the meaning of 'mental disorder' see PARA 402 ante.

8 For the meaning of 'hospital' for these purposes see PARA 564 note 4 ante; and see also PARA 417 ante. As to 'nature' and 'degree' see the general admission criteria; and PARAS 461, 491 ante.

9 As to the meaning of 'medical treatment' see PARA 552 ante. For these purposes, 'medical treatment' is to be construed widely: see *Reid v Secretary of State for Scotland* [1999] 2 AC 512, [1999] 1 All ER 481, HL.

10 Mental Health Act 1983 s 72(1)(a)(i) (as substituted: see note 4 supra). For the duty to discharge to apply, the tribunal must be satisfied that the patient is not so suffering, which is 'not the same thing as saying the tribunal is not satisfied that he is so suffering': *R v Wessex Mental Health Review Tribunal, ex p Wiltshire County Council* (1989) Times, 29 August, CA, per Lord Donaldson of Lymington MR.

As to the burden of proof under the Mental Health Act 1983 s 72(1) (as substituted) and under s 73(1) (as substituted) (see PARA 570 post) see *R (on the application of H) v London North and East Region Mental Health Review Tribunal (Secretary of State for Health intervening)* [2001] EWCA Civ 415, [2002] QB 1 (in which a declaration of incompatibility under the Human Rights Act 1998 s 4 (prospectively amended) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS) was made in relation to the Mental Health Act 1983 ss 72-73 (as amended)). The burden of proof justifying the continued detention of a patient in hospital is now on the detaining authority, ie the hospital. In practice this may be discharged by representation of the hospital at the hearing by the responsible medical officer (see note 28 infra) usually on notice to the mental health review tribunal, although the practice is variable. The tribunal must direct the discharge of a patient if it is not satisfied that the Mental Health Act 1983 criteria continue to be fulfilled.

11 Ibid s 72(1)(a)(ii) (as substituted: see note 4 supra). See note 10 supra.

12 Ie in the case of patients liable to be detained otherwise than under ibid s 2 (see PARA 460 ante). This includes patients admitted in pursuance of applications for admission for treatment under s 3 (see PARA 461 ante), hospital orders (see PARA 491 ante), transfer directions without restriction (see PARAS 535-536 ante), and orders or directions having the same effect (see PARA 488 ante).

13 For the meaning of these terms see PARAS 402-403 ante.

14 Mental Health Act 1983 s 72(1)(b)(i) (as substituted: see note 4 supra). Detention might be appropriate even though there was no medical treatment which could be given which might alleviate or prevent the deterioration of the condition of a person suffering from a psychopathic disorder, as medical treatment

encompasses care in a secure hospital under medical supervision: *R v Mersey Mental Health Review Tribunal, ex p D* (1987) Times, 13 April, DC; and see *R v Mersey Mental Health Review Tribunal, ex p Dillon* CO/1381/86, DC; *R v South East Thames Mental Health Review Tribunal, ex p Ryan* CO/98/87, DC. See also *R v Canons Park Mental Health Review Tribunal, ex p A* [1994] 2 All ER 659, CA (when exercising its mandatory power to discharge a patient, a tribunal does not have to have regard to the treatability test but only to the appropriateness and safety tests contained in the Mental Health Act 1983 s 72(1)(b) (as substituted)); *R (on the application of the Secretary of State for the Home Department) v Mental Health Review Tribunal* [2004] EWHC 1029 (Admin), [2004] All ER (D) 127 (Apr) (failure of the tribunal to consider the question of conditional discharge as required by the Mental Health Act 1983 s 73(2) (as substituted) (see PARA 570 post), having concluded that the interested party who had been detained was not suffering from a psychopathic disorder for the purposes of s 72(1)(b) (as substituted), vitiated its decision); *Reid v Secretary of State for Scotland* [1999] 2 AC 512, [1999] 1 All ER 481, HL (consideration of appropriateness test; it was held that the same criteria are to be applied on discharge as on admission, effectively overruling *R v Canons Park Mental Health Review Tribunal, ex p A* supra on this point).

As to the relevant standard of proof under the Mental Health Act 1983 s 72 (as amended) and s 73 (as amended) (see PARA 570 post) see *R (on the application of DJ) v Mental Health Review Tribunal, R (on the application of AN) v Mental Health Review Tribunal (Northern Region)* [2005] EWHC 587 (Admin), (2005) Times, 18 April (the issue as to whether a patient who had been detained under the Mental Health Act 1983 and who applied for discharge was at that time suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder was a matter that was susceptible to proof, and therefore fell to be determined by reference to the civil standard of proof; however, the other issues to be determined pursuant to ss 72-73 (as amended) involved an evaluative judgment and were therefore not susceptible to a defined standard of proof). See also *R v London South and West Region Mental Health Review Tribunal, ex p Moyle* (2000) Times, 10 February, [1999] All ER (D) 1504 (criteria for discharge mirror criteria for admission but burden of proof reversed). See note 10 supra.

15 Mental Health Act 1983 s 72(1)(b)(ii) (as substituted: see note 4 supra). When giving reasons, the tribunal should indicate to which issue in either head (a) or head (b) in text the reasons are directed: *R v Mental Health Review Tribunal, ex p Pickering* [1986] 1 All ER 99 at 104 per Forbes J. See also *Reid v Secretary of State for Scotland* [1999] 2 AC 512, [1999] 1 All ER 481, HL. As to the protection of other persons see *R (on the application of Li) v Mental Health Review Tribunal* [2004] EWHC 51 (Admin), [2004] All ER (D) 173 (Jan). See note 10 supra.

16 See PARAS 525, 564 head (9) ante.

17 Mental Health Act 1983 s 72(1)(b)(iii) (as substituted: see note 4 supra). 'If released' does not necessarily refer to immediate release: see *R (on the application of B) v Mental Health Review Tribunal* [2003] EWHC 815 (Admin). See note 10 supra.

18 Ie under the Mental Health Act 1983 s 2.

19 So that the patient is not entitled to be discharged but the tribunal has power to discharge him under ibid s 72(1) (as substituted).

20 Ibid s 72(2)(a). Note that in the case of a patient suffering from psychopathic disorder or mental impairment, authority for his detention can only be renewed under s 20 if medical treatment in a hospital is likely to alleviate or prevent a deterioration in his condition: see s 20(4); and PARA 520 ante. See *R v Canons Park Mental Health Review Tribunal, ex p A* [1994] 2 All ER 659, CA (the tribunal must consider not whether it is satisfied that treatment is likely to alleviate or prevent deterioration of the patient's disorder but whether it is satisfied that treatment is unlikely to have such an effect).

21 Mental Health Act 1983 s 72(2)(b). Note that in the case of a patient suffering from mental illness or severe mental impairment, authority for his detention can only be renewed under s 20 if medical treatment in a hospital is likely to alleviate or prevent a deterioration in his condition or if, were he discharged, he would be unlikely to be able to care for himself, to obtain the care which he needs, or to guard himself against serious exploitation: see s 20(4); and PARA 520 ante.

22 Ibid s 72(3). The power to delay discharge applies whether the tribunal exercises its discretion to discharge under s 72(1) (as substituted) or its mandatory powers: see *R v Mental Health Review Tribunal, ex p P* CO/467/96. The Mental Health Act 1983 s 72(3) does not apply to restricted patients: see *R (on the application of the Secretary of State for the Home Department) v Mental Health Review Tribunal* (2000) 63 BMLR 181. However, see the Mental Health Act 1983 s 73(7); and PARA 570 post. The power to delay discharge does not apply to those under guardianship who are not liable to be detained: see the text to note 3 supra.

23 As to the meaning of 'with a view to facilitating future discharge' see *R (on the application of H) v Mental Health Review Tribunal and the Secretary of State for the Home Department* [2002] EWHC 1522 (Admin). If future discharge is delayed unreasonably, it could give rise to violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 5 (see

CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 127 et seq): see *Johnson v United Kingdom* (1997) 27 EHRR 296, 40 BMLR 1, ECtHR. See also *Kolanis v United Kingdom (Application 517/02)* [2005] All ER (D) 227 (Jun), ECtHR (in which there was held to be a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms art 5(4), as detention in hospital was no longer necessary).

24 The tribunal must specify the period at the expiry of which it will consider the case further if the recommendations have not been complied with: Mental Health Review Tribunal Rules 1983, SI 1983/942, r 24(4). If it then appears to the tribunal, after making appropriate inquiries of the responsible authority, that the recommendation has not been complied with, it may reconvene the proceedings after giving all parties not less than 14 days' notice (or less if all agree) of the date, time and place: r 25(2) (amended by SI 1998/1189). This rule does not apply where the tribunal has no power to make such a recommendation: see *Grant v Mental Health Review Tribunal* (1986) Times, 28 April; and PARA 570 post. A reconvened tribunal at the time of further consideration has all of the powers of the original tribunal: *Mental Health Review Tribunal v Hempstock* (1997) 39 BMLR 123.

25 Mental Health Act 1983 s 72(3). As to the power of tribunals to discharge restricted patients see PARAS 570-572 post.

26 *Ie* under *ibid* Pt III (ss 35-55) (as amended).

27 *Ie* under *ibid* s 72(1) (as substituted).

28 For the purposes of *ibid* Pt V (ss 65-79) (as amended), unless the context otherwise requires, 'responsible medical officer' means the responsible medical officer within the meaning of Pt II (ss 2-34) (as amended) (see PARA 506 note 1 ante): s 79(3) (amended by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 13).

29 As to supervision applications see PARA 528 ante.

30 Mental Health Act 1983 s 72(3A) (added by the Mental Health (Patients in the Community) Act 1995 Sch 1 para 10(2)).

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

569 Powers to direct discharge of non-restricted hospital patients

TEXT AND NOTES 13-15--In head (a) for 'mental illness ... forms of disorder' read 'mental disorder or from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment'; the tribunal must also direct the discharge of a patient if it is not satisfied that appropriate medical treatment (see PARA 461) is available for him: Mental Health Act 1983 s 72(1)(b)(i), (iia) (s 72(1)(b)(i) amended, s 72(1)(b)(iia) added, by Mental Health Act 2007 s 4(8)(a), Sch 1 para 14(a)).

TEXT AND NOTES 18-21--Repealed: Mental Health Act 2007 s 4(8)(b), Sch 11 Pt 2.

NOTE 14--*R (on the application of AN)*, cited, affirmed sub nom *R (on the application of N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605, [2006] QB 468.

NOTE 24--SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705. The phrase 'his case' referred to the patient's application to the tribunal, and so the patient may withdraw the application after the tribunal has made its

recommendation: *R (on the application of O) v Mental Health Review Tribunal* [2006] EWHC 2659 (Admin), (2006) 93 BMLR 110.

NOTE 28--References to responsible medical officer now to responsible clinician: Mental Health Act 1983 s 79(6) (amended by Mental Health Act 2007 s 13(3)).

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570. Powers to direct discharge of restriction order patients.

Where an application¹ to a mental health review tribunal is made by a restricted patient² who is subject to a restriction order³, or where the case of such a patient is referred to a tribunal⁴, the tribunal must direct the patient's absolute discharge⁵ if: (1) it is not satisfied either: (a) that the patient is then suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or (b) that it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment⁶; and (2) it is satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment⁷. Where a patient is absolutely discharged, he thereupon ceases to be liable to be detained by virtue of the hospital order⁸ and the restriction order⁹ ceases to have effect¹⁰.

In the case of such patients, where the situation set out in head (1) above applies but not that set out in head (2) above, the tribunal must direct the conditional discharge of the patient¹¹. The patient must then comply with such conditions as are imposed at the time by the tribunal¹² or at any subsequent time by the Secretary of State¹³ and may be recalled to hospital by the Secretary of State¹⁴ as if he had been conditionally discharged by the Secretary of State¹⁵. If the restriction order ceases to have effect after the patient has been conditionally discharged by a tribunal he is, unless previously recalled to hospital, deemed to be absolutely discharged on the date when the order ceases to have effect¹⁶. The tribunal may defer a direction for conditional discharge until the arrangements which appear to it necessary for the purpose¹⁷ have been made to its satisfaction¹⁸.

Unlike in the case of unrestricted patients, the tribunal has no power to make recommendations in regard to restricted patients¹⁹. There is also no power to adjourn to allow the patient's condition to improve or to allow for sustained development²⁰. The tribunal may now, when considering making a deferred conditional discharge order, adjourn for the necessary arrangements to be made and reconvene to reconsider the case in the event that it does not prove possible to fulfil the proposed conditions²¹.

1 As to such applications see PARA 564 head (f) ante. Tribunals were given powers to direct the discharge of restriction order patients following the decision of the European Court of Human Rights in *X v United Kingdom* (1981) 4 EHRR 188, ECtHR, that all persons detained because they are 'of unsound mind' are entitled to a periodic judicial consideration of the merits of their continued detention, under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 5(4) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 127, 132). The system in the United Kingdom whereby the decision to order a patient's discharge could only be taken by the Secretary of State was held to contravene the European Convention on Human Rights art 5(4): *Benjamin v United Kingdom (Application 28212/95)* (2002) 36 EHRR 1, [2002] All ER (D) 160 (Sep), ECtHR. See also *R (on the application of P) v Secretary of State for the Home Department* [2003] EWHC 2953 (Admin), (2003) Times, 29 December, [2003] All ER (D) 205 (Dec) (the right to review the lawfulness of detention does not mean that the mental health review tribunal and the discretionary lifer panel of the Parole Board have to be convened simultaneously). See also *Kolanis v United Kingdom (Application 517/02)* [2005] All ER (D) 227 (Jun), ECtHR (in which there was held to be a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms art 5(4) as the patient's detention in hospital was in the circumstances longer than necessary).

2 For the meaning of 'restricted patient' see PARA 564 note 58 ante.

3 As to restriction orders see PARA 496 ante. Cf the tribunal's powers in relation to restriction directions: see PARA 571 post.

4 As to such references see PARA 568 ante.

5 There is no general discretion to discharge as with unrestricted patients: see PARA 569 ante.

6 As to the matters mentioned in the Mental Health Act 1983 s 72(1)(b)(i) or (ii) (as substituted): see PARA 569 ante. For the meaning of 'hospital' for these purposes see PARA 564 note 4 ante; and see also PARA 417 ante.

The liability to be recalled is not simply to address the danger to others but may also be for therapeutic reasons: *R v North West Thames Mental Health Review Tribunal, ex p Cooper* (1990) 5 BMLR 7. See also *R v Mental Health Review Tribunal for South Thames Region, ex p Smith* (1998) 47 BMLR 104 (degree of illness irrelevant; nature of illness considered to determine whether discharge was appropriate); *R v London South and West Region Mental Health Review Tribunal, ex p Moyle* (2000) Times, 10 February, [1999] All ER (D) 1504 (criteria for discharge mirror criteria for admission but burden of proof reversed).

As to the relevant standard of proof under the Mental Health Act 1983 s 72 (as amended) (see PARA 569 ante) and s 73 (as amended) see *R (on the application of DJ) v Mental Health Review Tribunal, R (on the application of AN) v Mental Health Review Tribunal (Northern Region)* [2005] EWHC 587 (Admin), (2005) Times, 18 April (the issue as to whether a patient who had been detained under the Mental Health Act 1983 and who applied for discharge was at that time suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder was a matter that was susceptible to proof, and therefore fell to be determined by reference to the civil standard of proof; however, the other issues to be determined pursuant to ss 72-73 (as amended) involved an evaluative judgment and were therefore not susceptible to a defined standard of proof). See also *R (on the application of East London and the City Mental Health NHS Trust) v Mental Health Review Tribunal* [2005] All ER (D) 107 (Aug).

7 Mental Health Act 1983 s 73(1) (s 73(1), (2) substituted by the Mental Health Act 1983 (Remedial) Order 2001, SI 2001/3712, art 4). The mental health review tribunal must address this provision: *R (on the application of the Secretary of State for the Home Department) v Mental Health Review Tribunal* [2001] EWHC 849 (Admin). The liability to recall is not simply to address danger to others but could also be for therapeutic reasons: *R v North West Thames Mental Health Review Tribunal, ex p Cooper* (1990) 5 BMLR 7. Under this provision, the tribunal has to focus on the existence or potential risk of recurrence of any mental impairment making detention in hospital for appropriate treatment necessary for the patient's health and safety or for the protection of other persons; the judge also has to consider the defendant's psychiatric problems and the benefit medical evidence might suggest that the defendant is likely to receive from treatment: see *R v A* [2005] EWCA Crim 2077, [2005] All ER (D) 28 (Aug). See also *R (on the application of DJ) v Mental Health Review Tribunal; R (on the application of AN) v Mental Health Review Tribunal (Northern Region)* [2005] EWHC 587 (Admin), (2005) Times, 18 April; and note 6 supra.

As to the burden of proof under the Mental Health Act 1983 s 73(1) (as substituted) see PARA 569 note 10 ante.

8 For the meaning of 'hospital order' see PARA 491 note 5 ante.

9 For the meaning of 'restriction order' see PARA 496 note 7 ante.

10 Mental Health Act 1983 s 73(3). Where a patient's discharge has been ordered, an approved social worker can only lawfully apply for the patient's readmission if he reasonably considers in good faith that there is fresh information not known to the tribunal but altering the complexion of the case: *R (on the application of Von Brandenburg (aka Hanley)) v East London and the City Mental Health NHS Trust* [2003] UKHL 58, [2004] 2 AC 280, [2004] 1 All ER 400. Note that an application by an approved social worker can relate only to a civil detention under the Mental Health Act 1983 Pt II (ss 2-34) (as amended). As to the link between s 73(3) and s 75(3) (see PARA 572 post) see *R (on the application of SC) v Mental Health Review Tribunal* [2005] EWHC 17 (Admin), (2005) Times, 24 January.

11 Mental Health Act 1983 s 73(2) (as substituted: see note 7 supra). Even though the tribunal finds as a fact that the patient is not then suffering from mental disorder, it must direct a conditional discharge unless satisfied that it is not appropriate for him to remain liable to recall to hospital. He remains a 'patient' for this purpose until discharged absolutely, although s 145(1) provides that a 'patient' means a person suffering or appearing to be suffering from mental disorder: *R v Merseyside Mental Health Review Tribunal, ex p K* [1990] 1 All ER 694, CA; *R v North West Thames Mental Health Review Tribunal, ex p Cooper* (1990) 5 BMLR 7. The mental health review tribunal has no power to order a local authority or a health authority to produce a care plan for a patient who has been given a conditional discharge: *R v Mental Health Review Tribunal, ex p Hall* [1999] 4 All ER 883, [2000] 1 WLR 1323, (1999) 51 BMLR 117, CA. See also *R (on the application of the Secretary of State for the Home Department) v Mental Health Review Tribunal* [2004] EWHC 1029 (Admin), [2004] All ER (D) 127 (Apr) (the failure of the tribunal to consider the question of conditional discharge as required by the Mental Health Act 1983 s 73(2) (as substituted), having concluded that the interested party who had been detained was not suffering from a psychopathic disorder for the purposes of s 72(1)(b) (as substituted) (see PARA 769 ante), vitiated its decision).

In so far as the Mental Health Act 1983 s 73 (as amended) places the burden of proof on a restricted patient to show that he is no longer suffering from a mental disorder warranting detention, it is incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 5: *R (on the application of H) v Secretary of State for the Home Department* [2003] UKHL 59, [2004] 2 AC 253, [2004] 1 All ER 412. See also note 6 supra. A patient assessed as no longer suffering from mental illness need not inevitably be immediately given an absolute discharge, and a conditional discharge is a lawful alternative. It is important, however, that once a conditional discharge is made and deferred (ie under the Mental Health Act 1983 s 73(7): see notes 11, 17 infra), arrangements are made so that the patient's actual discharge is not unreasonably delayed: see *Johnson v United Kingdom* (1997) 27 EHRR 296, 40 BMLR 1, ECtHR. Unless a patient is assessed as no longer suffering from mental disorder at all, a finding that he is entitled to a conditional discharge is not necessarily a finding that the criteria for compulsory detention under *Winterwerp v Netherlands* (1981) 4 EHRR 228, ECtHR, are no longer fulfilled: see *Johnson v United Kingdom* supra; *Kolanis v United Kingdom* (Application 517/02) [2005] All ER (D) 227 (Jun), ECtHR. See also note 17 infra. A conditional discharge may require residence and strict conditions in another hospital so long as the patient is not actually detained or deprived from his liberty as such: *R (on the application of the Secretary of State for the Home Department) v Mental Health Review Tribunal* [2002] EWCA Civ 1868, [2002] All ER (D) 307 (Dec); but see *R (on the application of the Secretary of State for the Home Department) v Mental Health Review Tribunal* [2004] EWHC 2194 (Admin), [2004] All ER (D) 87 (Oct); *Guzzardi v Italy* (Application 7367/76) (1980) 3 EHRR 333, ECtHR; *Ashingdane v United Kingdom* (1985) 7 EHRR 528, ECtHR. As to the relevant conditions of a conditional discharge see *R v Mental Review Tribunal, ex p Hall* [1999] 4 All ER 883, [2000] 1 WLR 1323, (1999) 51 BMLR 117; *R (on the application of H) v Secretary of State for the Home Department* [2003] UKHL 59, [2004] 2 AC 253, [2004] 1 All ER 412; *W v Doncaster Metropolitan Borough Council* [2004] EWCA Civ 378, sub nom *R (on the application of W) v Doncaster Metropolitan Borough Council* (2004) Times, 13 May. See also PARAS 524 note 5 ante, 668 post.

12 The tribunal cannot impose a condition that the patient remain in a hospital, since discharge for this purpose must mean release from hospital: see *Secretary of State for the Home Department v Mental Health Review Tribunal for the Mersey Regional Health Authority, Secretary of State for the Home Department v Mental Health Review Tribunal for Wales* [1986] 3 All ER 233, [1986] 1 WLR 1170; and PARA 524 note 5 ante. As to residence in hospital as opposed to detention there see also note 11 supra.

13 Mental Health Act 1983 s 73(4)(b). The Secretary of State may from time to time vary any condition so imposed: s 73(5). As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

14 Ie under *ibid* s 42(3): see PARA 501 ante.

15 *Ibid* s 73(4)(a). As to conditional discharge (and recall) by the Secretary of State see s 42(2); and PARA 524 ante. Section 73 (as amended) is without prejudice to s 42: s 73(8). As to the additional powers of the Secretary of State in respect of restriction order patients see PARAS 496, 501 ante.

16 *Ibid* s 73(6).

17 The necessary arrangements must be made for the purpose of the conditional discharge. Any unreasonable delay in achieving a deferred conditional discharge (eg due to a failure to implement any of the conditions proposed by the tribunal) may result in a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 5: *Johnson v United Kingdom* (1997) 27 EHRR 296, 40 BMLR 1, ECtHR; *R (on the application of K) v Camden and Islington Health Authority* [2001] EWCA Civ 240, [2002] QB 198, (2001) 61 BMLR 173; *Kolanis v United Kingdom* (Application 517/02) [2005] All ER (D) 227 (Jun), ECtHR. This has been remedied by allowing a tribunal to reconsider its decision and conditions in the light of any such difficulties. The ruling in *Campbell v Secretary of State for the Home Department* [1988] AC 120, sub nom *Secretary of State for the Home Department v Oxford Regional Mental Health Review Tribunal* [1987] 3 All ER 8, HL, has been overruled on this point to ensure compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms art 5: see *R (on the application of H) v Secretary of State for the Home Department* [2003] UKHL 59, [2004] 2 AC 253, [2004] 1 All ER 412, endorsing the ruling of the Court of Appeal. Thus a deferred conditional discharge direction is no longer a final decision of the tribunal, but provisional upon realisation of appropriate conditions. See also *R (on the application of C) v Secretary of State for the Home Department* [2002] EWCA Civ 647, (2002) Times, 24 May. Leave of absence or a transfer may be used to facilitate a conditional discharge. In *R (on the application of H) v Mental Health Review Tribunal* supra, the court identified 'categorical differences' between patients no longer suffering from mental disorder (see eg *Johnson v United Kingdom* supra), and those whose mental disorder was simply no longer of a sufficient 'nature or degree'. See also *W v Doncaster Metropolitan Borough Council* [2004] EWCA Civ 378, (2004) Times, 13 May. This approach has been confirmed in *Kolanis v United Kingdom* (Application 517/02) supra. In that case, the court also found that a finding of entitlement to conditional discharge in a case, other than that falling into the *Johnson v United Kingdom* supra category, did not necessarily mean that a person was unlawfully detained under the Convention for the Protection of Human Rights and Fundamental Freedoms article 5 (see *Winterwerp v Netherlands* (1981) 4 EHRR 228, ECtHR); the court noted the difference in wording between the criteria in *Winterwerp v Netherlands* supra and the criteria for admission or discharge under the Mental Health Act 1983.

There may be a damages claim under the Convention for the Protection of Human Rights and Fundamental Freedoms art 5(5); and for the relevant procedure see *Anufrijeva v Southwark London Borough Council, R (on the application of N) v Secretary of State for the Home Department, R (on the application of M) v Secretary of State for the Home Department* [2003] EWCA Civ 1406, [2004] 1 All ER 833.

18 Mental Health Act 1983 s 73(7). Further, if because of such deferment no direction has been given before the patient's case comes before the tribunal on a subsequent application or reference, the previous application or reference must be treated as one on which no direction can be given: s 73(7). See notes 11, 17 supra.

19 *Grant v Mental Health Review Tribunal* (1986) Times, 28 April.

20 *R v Nottingham Mental Health Review Tribunal, ex p Secretary of State for the Home Department, R v Trent Mental Health Review Tribunal, ex p Secretary of State for the Home Department* (1988) Times, 12 October, CA.

21 See note 17 supra. As to the burden of proof etc see PARA 569 ante.

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

570 Powers to direct discharge of restriction order patients

NOTES 6, 7--*R (on the application of AN)*, cited, affirmed sub nom *R (on the application of N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605, [2006] QB 468.

TEXT AND NOTE 6--Or, under head (1), it is not satisfied (c) that appropriate medical treatment is available for him: Mental Health Act 1983 s 73(1) (amended by Mental Health Act 2007 s 4(9)), referring to the matter mentioned in the Mental Health Act 1983 s 72(1)(b)(iia) (see PARA 569).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(3) POWERS OF TRIBUNALS/571. Powers in relation to transferred prisoners.

571. Powers in relation to transferred prisoners.

Where an application to a tribunal is made by a restricted patient¹ who is subject to a limitation direction or restriction direction², or the case of such a patient is referred to a tribunal³, the tribunal⁴ must notify the Secretary of State⁵ whether, in its opinion, the patient would be entitled to be absolutely or conditionally discharged⁶ if he were subject to a restriction order⁷; and, if the latter, it may recommend that he continue to be detained in hospital⁸ if not discharged⁹. If the patient is subject to a transfer direction¹⁰ under the powers relating to remand or civil prisoners¹¹ and the tribunal notifies the Secretary of State that he would be entitled to be discharged, the Secretary of State must, unless the tribunal also recommended that he should continue to be detained in hospital¹², by warrant direct that he be remitted to prison or another institution¹³, there to be dealt with as if he had not been removed to hospital¹⁴. In the case of other patients, if the tribunal notifies the Secretary of State that the patient would be entitled to be discharged, and within the period of 90 days beginning with the date of that notification the Secretary of State gives notice to the tribunal that the patient may be discharged, the tribunal must direct his absolute or conditional discharge¹⁵. If the Secretary of State does not give such notice, the hospital managers¹⁶ must, unless the tribunal also recommended that the patient should continue to be detained in hospital¹⁷, transfer him to a prison or another institution¹⁸, there to be dealt with as if he had not been removed to hospital¹⁹.

1 For the meaning of 'restricted patient' see PARA 564 note 58 ante.

2 As to limitation directions see PARA 490 ante. As to restriction directions see PARA 537 ante. See also PARA 537 note 8 ante.

3 See PARA 568 ante.

4 Mental Health Act 1983 s 74(1) (amended by the Crime (Sentences) Act 1997 s 55, Sch 4 para 12(10)). See *R (on the application of A) v Mental Health Review Tribunal* [2004] EWHC 1999 (Admin), [2004] All ER (D) 78 (Aug) (discharge of an ill foreign national detained also under the Immigration Act 1971 and the Anti-Terrorism, Crime and Security Act 2001 s 21 (now repealed)).

5 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

6 Ie under the Mental Health Act 1983 s 73 (as amended): see PARA 570 ante.

7 Ibid s 74(1)(a).

8 For the meaning of 'hospital' for these purposes see PARA 564 note 4 ante; and see also PARA 417 ante.

9 Mental Health Act 1983 s 74(1)(b). This advisory power of the tribunal to recommend discharge has been found to be incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 5(4) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 127 et seq): see *R (on the application of D) v Secretary of State for the Home Department* [2002] EWHC 2805 (Admin), [2003] 1 WLR 1315; *Benjamin v United Kingdom (Application 28212/95)* (2003) 36 EHRR 1, [2002] All ER (D) 160 (Sep), ECtHR. See also *R (on the application of P) v Secretary of State for the Home Department* [2003] EWHC 2953 (Admin), (2003) Times, 29 December, [2003] All ER (D) 205 (Dec). This incompatibility has been cured by amending the Mental Health Act 1983 so that it provides that where the tribunal has made a recommendation as in s 74(1)(b) in the case of a patient who is subject to a restriction direction or a limitation direction: (1) the fact that the restriction direction or limitation direction remains in force does not prevent the making of any application or reference to the Parole Board by or in respect of him or the exercise by him of any power to require the Secretary of State to refer his case to the Parole Board; and (2) if the Parole Board makes a direction or recommendation by virtue of which the patient would become entitled

to be released (whether unconditionally or on licence) from any prison or other institution in which he might have been detained if he had not been removed to hospital, the restriction direction or limitation direction ceases to have effect at the time when he would become entitled to be so released: s 74(5A) (added by the Criminal Justice Act 2003 s 295). As to the Parole Board see PRISONS vol 36(2) (Reissue) PARA 618.

10 As to transfer directions see PARA 535 ante.

11 Ie under the Mental Health Act 1983 s 48 (as amended; prospectively amended): see PARA 536 ante.

12 Ie a recommendation under ibid s 74(1)(b) (see the text and note 9 supra).

13 Ie in which he might have been detained had he not been removed to hospital.

14 Mental Health Act 1983 s 74(4). On his arrival in the prison or other institution, the relevant hospital direction and the limitation direction or, as the case may be, the relevant transfer direction and restriction direction cease to have effect: s 74(5) (amended by the Crime (Sentences) Act 1997 Sch 4 para 12(11)). As to hospital directions see PARA 490 ante.

15 Mental Health Act 1983 s 74(2). The provisions of s 73(3)-(8) apply in relation to absolute or conditional discharge under s 74 (as amended) as they apply to absolute or conditional discharge under s 73 (see PARA 570 ante), taking references to the relevant hospital order and the restriction order as references to hospital direction and the limitation direction or, as the case may be, to the transfer direction and the restriction direction: s 74(6) (amended by the Crime (Sentences) Act 1997 Sch 4 para 12(12)).

16 For the meaning of 'managers' see PARA 439 ante.

17 See note 12 supra.

18 See note 13 supra.

19 Mental Health Act 1983 s 74(3). On his arrival in the prison or other institution, the relevant hospital direction and the limitation direction or, as the case may be, the relevant transfer direction and restriction direction cease to have effect: s 74(5) (as amended: see note 14 supra).

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(3) POWERS OF TRIBUNALS/572. Powers in relation to conditionally discharged restricted patients.

572. Powers in relation to conditionally discharged restricted patients.

Where an application to a tribunal is made by a conditionally discharged restricted patient who has not been recalled to hospital¹, the tribunal may vary any condition to which the patient is subject or impose any condition which might have been imposed, or may direct that the restriction order or restriction direction² to which he is subject is to cease to have effect³. If the latter, the patient ceases to be liable to be detained by virtue of the relevant hospital order or transfer direction⁴.

1 As to such applications see PARA 564 head (g) ante.

2 As to restriction orders see PARA 496 ante. As to restriction directions see PARA 537 ante.

3 Mental Health Act 1983 s 75(3). See *R (on the application of SC) v Mental Health Review Tribunal* [2005] EWHC 17 (Admin), (2005) Times, 24 January.

4 Mental Health Act 1983 s 75(3). As to hospital orders see PARA 491 ante. As to transfer directions see PARA 535 ante.

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

572 Powers in relation to conditionally discharged restricted patients

TEXT AND NOTES 3, 4--Mental Health Act 1983 s 75(3) amended: Mental Health Act 2007 s 41.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(3) POWERS OF TRIBUNALS/573. Power to order discharge from guardianship and after-care under supervision.

573. Power to order discharge from guardianship and after-care under supervision.

Where an application¹ or reference² is made to a mental health review tribunal by or in respect of a patient who is subject to guardianship³, the tribunal may in any case direct that the patient be discharged⁴. Moreover, it must so direct if satisfied: (1) that the patient is not then suffering from mental illness, psychopathic disorder, mental impairment or severe mental impairment⁵; or (2) that it is not necessary in the interests of the welfare of the patient, or for the protection of other persons, that he should remain under guardianship⁶.

Where an application is made to a mental health review tribunal by or in respect of a patient who is subject to after-care under supervision⁷, or who, if he has not yet left hospital⁸, is to be so subject after he leaves, the tribunal may in any case direct that the patient is to cease to be so subject, or not become so subject⁹. The tribunal will so direct if it is satisfied: (a) that, in a case where the patient has not yet left hospital, the conditions in regard to the making of a supervision application¹⁰ are not complied with¹¹; or (b) in any case, that the conditions in regard to the renewal of a direction for after-care under supervision¹² are not complied with¹³.

1 As to such applications see PARA 564 heads (3), (4), (6), (13), (a), (b) ante.

2 The provisions of the Mental Health Act 1983 s 72(4) are applied to references by s 72(6). As to such references see PARAS 567-568 ante.

3 Ie subject to the guardianship of a local social services authority (see PARA 424 ante) or a person approved by that authority, by virtue of an application for guardianship under ibid s 7 (see PARA 469 ante) or a guardianship order under ss 37(1), 40(4) (s 37(1) as amended) (see PARA 502 ante).

4 Ibid s 72(4). A tribunal is not empowered to determine whether the circumstances of a case were such as to render unlawful the guardianship of a patient: see PARA 569 note 4 ante.

5 Ibid s 72(4)(a). For the meanings of 'psychopathic disorder', 'severe mental impairment' and 'mental impairment' see PARAS 402-403 ante. There is no specification as to the nature or degree of the disorder, as there is in the case of patients detained in hospital: see PARAS 569-570 ante.

6 Ibid s 72(4)(b).

7 As to such applications see PARA 564 heads (10), (11), (12) ante.

8 For the meaning of 'hospital' for these purposes see PARA 564 note 4 ante; and see also PARA 417 ante.

9 Mental Health Act 1983 s 72(4A) (added by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 10).

10 Ie the conditions under the Mental Health Act 1983 s 25A(4) (as added): see PARA 528 ante. As to the making, duration and renewal of supervision applications see PARA 528 et seq ante.

11 Ibid s 72(4A)(a) (as added: see note 9 supra).

12 Ie the conditions under ibid s 25G(4) (as added): see PARA 532 ante.

13 Ibid s 72(4A)(b) (as added: see note 9 supra).

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

573 Power to order discharge from guardianship and after-care under supervision

TEXT AND NOTES--These provisions are amended to apply also to a community patient: see Mental Health Act 1983 s 72(1), (1A), (2), (3A) (s 72(1), (2) amended, s 72(1A), (3A) added, by Mental Health Act 2007 Sch 3 para 21).

TEXT AND NOTE 5--Reference to mental illness, psychopathic disorder, mental impairment or severe mental impairment now to mental disorder: Mental Health Act 1983 s 72(4) (a) (amended by Mental Health Act 2007 Sch 1 para 14(c)).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(3) POWERS OF TRIBUNALS/574. Power to reclassify patients.

574. Power to reclassify patients.

Where an application or reference¹ is made to a mental health review tribunal by or in respect of a patient² and the tribunal does not direct that the patient is to be discharged or, if he is (or is to be) subject to after-care under supervision, that he is to cease to be so subject (or is not to become so subject), it may, if satisfied that he is suffering from a form of mental disorder³ other than the form specified in the application⁴, order⁵ or direction⁶ relating to him, direct that the application, order or direction be amended by substituting for the form of mental disorder specified in it such other form of mental disorder as appears to be appropriate⁷.

1 As to the cases where applications may be made to a mental health review tribunal see PARA 564 ante. The Mental Health Act 1983 s 72(5) is applied to references by s 72(6). As to such references see PARAS 567-568 ante.

2 For the meaning of 'patient' see PARA 435 ante.

3 For the meaning of 'mental disorder' and its various forms see PARAS 402-403 ante.

4 I.e. an application for admission for treatment or for guardianship under the Mental Health Act 1983 ss 3, 7 (see PARAS 461, 469 ante) or a supervision application under s 25A (as added and amended) (see PARA 528 ante).

5 I.e. a hospital or guardianship order: see *ibid* s 37 (as amended); and PARAS 491, 502 ante.

6 I.e. a direction given by the Secretary of State for the transfer of a prisoner to hospital: see *ibid* ss 47, 48 (as amended; prospectively amended); and PARAS 535-536 ante. As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

7 *Ibid* s 72(5) (amended by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 10(4)). As to the reclassification of patients following a report by the appropriate medical officer of the local social services authority under the Mental Health Act 1983 s 16 see PARA 527 ante. As to the reclassification of a patient subject to after-care under supervision under s 25F (as added and amended) see PARA 531 ante.

A mental health review tribunal has the discretion to make amendments to an order by a simple deletion as well as substitution: *R v Anglia and Oxfordshire Mental Health Review Tribunal, ex p Hagan* (2000) Times, 21 January, (2000) 53 BMLR 9, [1999] All ER (D) 1472, CA. See also *R (on the application of AL) v Secretary of State for the Home Department* [2005] EWCA Civ 02, [2005] All ER (D) 142 (Jan) (exercise of power to detain individual under the Mental Health Act 1983 s 72(5) (as amended) on reclassification of mental disorder as psychopathic disorder). See also *R v South West Thames Mental Health Review Tribunal, ex p Demetri* (2 July 1997) Lexis.

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

574 Power to reclassify patients

NOTE 1--Mental Health Act 1983 s 72(6) amended: Mental Health Act 2007 Sch 1 para 14(c).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(3) POWERS OF TRIBUNALS/575. Power to state a case.

575. Power to state a case.

There is no provision in the Mental Health Act 1983 for any appeal from a decision of a mental health review tribunal; but a tribunal may, and if so required by the High Court¹ must, state in the form of a special case any question of law which may arise before it².

A party to proceedings³ before a mental health review tribunal is not entitled to apply to the High Court for an order directing the tribunal to state a case under this provision unless: (1) within 21 days after the tribunal's decision was communicated to him, he made a written request to the tribunal to state a case⁴; and (2) either the tribunal failed to comply with that request within 21 days after it was made or the tribunal refused to comply with it⁵.

A tribunal by whom a case is stated is entitled to attend the proceedings for the determination of the case and make representations to the court⁶.

If the court allows the appeal, it may give any direction which the tribunal ought to have given under Part V⁷ of the Mental Health Act 1983⁸.

It may be more appropriate to apply for judicial review⁹, which allows a broader consideration of the issues and a wider range of reliefs, rather than proceed by way of special case stated¹⁰.

1 As to the High Court see COURTS vol 10 (Reissue) PARA 351 et seq.

2 Mental Health Act 1983 s 78(8). See CPR Pt 52. The procedure for applications for requiring the tribunal to state a case, and for determining the case stated, is laid down in *Practice Direction--Appeals* (2001) PD 52 para 22.8; see the text and notes 3-8 infra. See further CIVIL PROCEDURE vol 12 (2009) PARA 1686.

3 'Party to proceedings' means: (1) the person who initiated the proceedings; and (2) any person to whom, in accordance with rules under the Mental Health Act 1983 s 78 (as amended), the tribunal sent notice of the application or reference or a request instead of notice or reference: *Practice Direction--Appeals* (2001) PD 52 para 22.8(1). As to the rules mentioned above see the Mental Health Review Tribunal Rules 1983, SI 1983/942 (as amended); and PARAS 579-581 post.

4 *Practice Direction--Appeals* (2001) PD 52 para 22.8(2)(a).

5 *Practice Direction--Appeals* (2001) PD 52 para 22.8(2)(b). The period for filing the application notice for an order under the Mental Health Act 1983 s 78(8) is: (1) where the tribunal failed to comply with the applicant's request to state a case within the period of 21 days, 14 days after the expiration of that period; (2) where the tribunal refused that request, 14 days after receipt by the applicant of notice of the refusal of his request: *Practice Direction--Appeals* (2001) PD 52 para 22.8(3).

6 *Practice Direction--Appeals* (2001) PD 52 para 22.8(4).

7 Ie the Mental Health Act 1983 Pt V (ss 65-79) (as amended).

8 *Practice Direction--Appeals* (2001) PD 52 para 22.8(5).

9 Ie under CPR Pt 54. Permission is required, promptly and usually no later than within three months of the relevant decision: see JUDICIAL REVIEW vol 61 (2010) PARA 658.

10 See *Bone v Mental Health Review Tribunal* [1985] 3 All ER 330 at 334 per Nolan J. See also *MP v Nottinghamshire Healthcare NHS Trust* [2003] EWHC 1782 (Admin), [2003] All ER (D) 323 (Jul).

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

575 Power to state a case

NOTE 3--SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(4) PROCEDURE/576. Regulation of procedure.

(4) PROCEDURE

576. Regulation of procedure.

The Lord Chancellor¹ has power to make rules² with respect to the making of applications³ to mental health review tribunals, and with respect to the proceedings of such tribunals and matters incidental to or consequential on such proceedings⁴. Any such rules may in particular make provision enabling a tribunal to postpone consideration of an application⁵; to transfer proceedings to another tribunal⁶; to dispose of an application without a formal hearing where this is not requested by the patient or it appears that such a hearing would be detrimental to his health⁷; to exclude members of the public or to prohibit publication of reports of the proceedings or the names of those concerned in them⁸; to regulate the representation of applicants⁹; and to regulate the methods by which relevant information may be obtained¹⁰. The rules may also restrict the persons qualified to serve on tribunals¹¹; confer ancillary powers on tribunals¹²; require tribunals to make available to applicants and patients copies of documents, and statements of the substance of oral information, furnished or received in connection with the proceedings¹³; and require tribunals to state the reasons for their decisions¹⁴.

In addition rules may be made for enabling any functions of a tribunal which relate to preliminary or incidental matters to be performed by the chairman of the tribunal¹⁵. If the chairman is unable to act, any functions conferred by the Mental Health Act 1983 on the chairman may be exercised by another tribunal member appointed for that purpose¹⁶.

Irregularity resulting from failure to comply with the rules before the tribunal has reached its decision does not of itself render proceedings void; but the tribunal may, and, if it considers that any person may have been prejudiced, must, take such steps as it thinks fit before reaching its decision to cure the irregularity¹⁷.

The tribunal has power to extend the time appointed by the rules for the doing of any act¹⁸.

1 As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

2 Mental Health Review Tribunal Rules 1983, SI 1983/942 (amended by SI 1996/314; SI 1998/1189; SI 2002/2469; SI 2004/696).

3 For these purposes, 'applications' includes all references: see the Mental Health Act 1983 s 78(3).

4 Ibid s 78(1)-(5). This includes provisions relating to assessment applications: see PARA 581 post. Any rules under this power may be so framed as to apply to all applications or references or to applications or references of any specified class, and may make different provision in relation to different cases: s 78(5).

5 See ibid s 78(2)(a); the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 9 (as amended); and PARA 585 post.

6 See the Mental Health Act 1983 s 78(2)(b); the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 17; and PARA 586 post. Rules may also be made concerning the transfer of references concerning restricted patients: see the Mental Health Act 1983 s 78(4)(b); the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 17(2); and PARA 586 post.

7 See the Mental Health Act 1983 s 78(2)(d); the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 22; and PARAS 590, 592 post.

8 See the Mental Health Act 1983 s 78(2)(e); the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 21; and PARA 591 post.

9 See the Mental Health Act 1983 s 78(2)(f); the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 10 (as amended); and PARA 587 post.

10 See the Mental Health Act 1983 s 78(2)(g); the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 11 (as amended), rr 14, 22(4); and PARA 588 post.

11 See the Mental Health Act 1983 s 78(2)(c); the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 8 (as amended); and PARA 561 ante. Rules may also be made restricting the persons qualified to serve as president of a tribunal when considering an application or reference relating to a restricted patient: Mental Health Act 1983 s 78(4)(a); and see PARA 561 ante.

12 See *ibid* s 78(2)(j). See eg the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 26.

13 See the Mental Health Act 1983 s 78(2)(h); the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 12; and PARA 582 post.

14 See the Mental Health Act 1983 s 78(2)(i); the Mental Health Review Tribunal Rules 1983, SI 1983/942, rr 23, 24 (as amended); and PARA 594 post.

15 Mental Health Act 1983 s 78(2)(j); Mental Health Review Tribunal Rules 1983, SI 1983/942, r 5. Rule 5 provides that the chairman may so act under r 6 (as amended) (information to be supplied to the tribunal), r 7 (as amended) (notice to other persons interested), r 9 (as amended) (postponement), r 10 (as amended) (authorisation of a representative of a patient), r 12 (disclosure of documents), r 13 (directions to ensure the speedy and just determination of the case), r 14(1) (witnesses), r 15 (further information), r 17 (transfer of proceedings), r 19 (as amended) (withdrawal), r 20 (notice of hearing), r 26 (extending or abridging time), or r 28 (curing irregularities), at any time up to the hearing.

16 Mental Health Act 1983 s 78(6).

17 Mental Health Tribunal Rules 1983, SI 1983/942, r 28. Failure to notify the Secretary of State of an application concerning a restricted patient, with the result that he loses the right to make representations to the tribunal, cannot be cured under this rule: *Campbell v Secretary of State for the Home Department* [1988] AC 120, sub nom *Secretary of State for the Home Department v Oxford Regional Mental Health Review Tribunal* [1987] 3 All ER 8, HL. As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

18 See the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 26.

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

576-594 Procedure

SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705 (amended by SI 2009/3348).

576 Regulation of procedure

NOTES 4-6--Mental Health Act 1983 s 78(2)(a), (b), (4) amended: Mental Health Act 2007 s 38(3)(c), (d); SI 2008/2833.

TEXT AND NOTE 4--The Lord Chancellor's function under the Mental Health Act 1983 s 78 is a protected function for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 489A.1.

NOTE 16--Mental Health Act 1983 s 78(6) amended: Mental Health Act 2007 s 38(3)(e).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(4) PROCEDURE/577. Procedure for making applications.

577. Procedure for making applications.

The application¹ to a mental health review tribunal must be made in writing addressed to the mental health review tribunal² for the area in which the hospital³ in which the patient⁴ is detained is situated or where he resides under guardianship or when subject to after-care under supervision (or in which he is to reside on becoming so subject after leaving hospital)⁵. The application must be made by the applicant⁶ or any person authorised by him to apply on his behalf⁷.

1 Applications and all other documents to be sent to a tribunal may be sent by prepaid post or delivered to its office: Mental Health Review Tribunal Rules 1983, SI 1983/942, r 27.

2 Responsible medical officers and guardians may not prevent patients detained in a hospital at which high security services are provided from sending communications so addressed: see the Mental Health Act 1983 s 134(2), (3)(d) (s 134(2) amended by the Health Act 1999 s 65(1), Sch 4 paras 65, 68(a)). As to such hospitals see PARA 418 ante.

3 For the meaning of 'hospital' for these purposes see PARA 564 note 4 ante; and see also PARA 417 ante.

4 For the meaning of 'patient' see PARA 435 ante.

5 Mental Health Act 1983 s 77(3) (amended by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 12). As to guardianship see PARA 469 et seq ante. As to after-care under supervision see PARA 528 et seq ante.

See *R (on the application of C) v Mental Health Review Tribunal* [2001] EWCA Civ 1110, [2002] 1 WLR 176, (2001) Times, 11 July (tribunal's practice of fixing hearings eight weeks after the application date held to be unlawful and a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 5(4) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 127, 132)).

6 Is the party who under the Mental Health Act 1983 is entitled to apply, or has applied, to a tribunal: Mental Health Review Tribunal Rules 1983, SI 1983/942, r 2(1).

7 Ibid r 3(1). The application must, wherever possible, include the following information: the name and address of the patient and, where this is different, of the applicant (ie the patient's nearest relative: see PARA 453 ante); the provisions of the Mental Health Act 1983 under which the patient is detained; and the name of any authorised representative: see the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 3(2)(a)-(e). In the case of a patient who is subject to, or will be subject to, after-care under supervision, an application must state: (1) the names of the persons who are, or will be, the patient's supervisor and community responsible officer; (2) the name and address of any place at which the patient is, or will be, receiving medical treatment; and (3) where the patient is subject to after-care under supervision, his current address, or in the case of a patient who is to be subject to after-care under supervision upon leaving hospital, the address of the hospital where he is, or was last, detained or is liable to be detained: r 3(2)(f) (added by SI 1996/314). The patient's address includes: (a) the address of the hospital or registered establishment where he is detained; (b) the name and address of a private guardian; and (c) where he has been conditionally discharged or granted leave of absence, the address of the hospital or establishment where he was last detained or liable to be detained, together with his current address: Mental Health Review Tribunal Rules 1983, SI 1983/942, r 3(2)(a). The rules refer to a mental nursing home, but such homes are now known as registered establishments. For the meaning of 'registered establishment' see PARA 421 ante. If any of this information is not included it should be provided by the responsible authority or, in the case of a restricted patient (see PARA 564 note 58 ante) by the Secretary of State: r 3(3). As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

576-594 Procedure

SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705 (amended by SI 2009/3348).

577 Procedure for making applications

TEXT AND NOTES 1-5--Mental Health Act 1983 s 77(3) further amended: Mental Health Act 2007 Sch 3 para 23.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(4) PROCEDURE/578. Withdrawal of applications.

578. Withdrawal of applications.

An applicant may withdraw his application at any time on giving notice in writing to the mental health review tribunal; and an application is deemed to be withdrawn if the patient¹ ceases to be liable to be detained or subject to guardianship² or after-care under supervision³ in England and Wales⁴. Where a patient who is subject to after-care under supervision fails without reasonable explanation to undergo a medical examination⁵, any application relating to that patient may be deemed by the tribunal to be withdrawn⁶.

1 For the meaning of 'patient' see PARA 435 ante.

2 As to guardianship see PARA 469 et seq ante.

3 As to after-care under supervision see PARA 528 et seq ante.

4 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 19(1), (2). The tribunal must agree to the withdrawal: r 19(1). The tribunal must inform the parties, and in the case of a restricted patient, the Secretary of State, of the withdrawal: r 19(3). Rule 19 (as amended) does not apply to references: r 29(a). For the meaning of 'England' see PARA 405 note 6 ante; and for the meaning of 'Wales' see PARA 405 note 7 ante. As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

5 See under ibid r 11 (as amended): see PARA 583 post.

6 Ibid r 19(2A) (added by SI 1996/314).

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

576-594 Procedure

SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705 (amended by SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(4) PROCEDURE/579. Notice to responsible authority and statement by authority.

579. Notice to responsible authority and statement by authority.

On receipt of an application, whether or not consideration of it is postponed¹, the mental health review tribunal must send a copy of the application² to the responsible authority³, the patient⁴ (if he is not the applicant) and (if the patient is a restricted patient⁵) the Secretary of State⁶.

As soon as practicable, or in any case within three weeks of receipt of the notice of the application (other than one relating to a conditionally discharged patient⁷), the responsible authority must send a statement to the tribunal (and in the case of a restricted patient to the Secretary of State) containing the following information⁸:

- 93 (1) so far as it is within its knowledge: the name and age of the patient and the name and address of his nearest relative⁹ and any other person who has a close interest in him; the date of admission or reception into guardianship; the name of the relevant health authority or primary care trust; details of the original authority for detention or guardianship; the form of mental disorder from which the patient is suffering; the name of the responsible medical officer and any other practitioner treating the patient; the dates of any previous tribunal hearing and decisions; details of any proceedings in the Court of Protection; and details of leave of absence if any¹⁰; and
- 94 (2) the following reports relating to patients (other than conditionally discharged patients) and patients subject (or to be subject) to after-care under supervision¹¹: an up-to-date medical report and, in so far as it is reasonably practicable to provide them, a social circumstances report, the views of the authority on the suitability of the patient for discharge and any other information or observations¹².

Where the patient is a restricted patient, the Secretary of State must send to the tribunal, as soon as practicable and in any case within three weeks of receipt by him of the authority's statement, a statement of such further information relevant to the application as may be available to him¹³.

Where the patient is a conditionally discharged patient, the Secretary of State must send as soon as possible¹⁴, or in any case within six weeks of receipt of notice of the application, the following information¹⁵:

- 95 (a) in so far as it is within his knowledge, the name and age of the patient, his history, the form of mental disorder¹⁶ from which he is suffering, the name and address of any medical practitioner, social worker or probation officer responsible for the care and supervision of the patient¹⁷; and
- 96 (b) the following reports in so far as it is reasonably practicable to provide them: an up-to-date medical report, an up-to-date report prepared by a social worker or probation officer on the patient's progress since discharge from hospital¹⁸, a report on the patient's home circumstances, and the views of the Secretary of State as to the suitability of the patient for absolute discharge¹⁹ and any other observations on the application which the Secretary of State wishes to make²⁰.

Where the patient is, or is to be, subject to after-care under supervision, the responsible authority must send a statement²¹ to the tribunal as soon as practicable, and in any case within

three weeks of the responsible authority's receipt of the notice of application, and this statement must contain:

- 97 (i) specified information, in so far as it is within the knowledge of the responsible authority²²;
- 98 (ii) specified reports²³;
- 99 (iii) the details of the after-care services being, or to be, provided²⁴; and
- 100 (iv) details of any after-care requirements imposed, or to be imposed, on the patient²⁵,

and must also be accompanied by copies of specified documents²⁶.

Any part of this statement which in the opinion of the responsible authority should be withheld from the applicant on the grounds that its disclosure would be undesirable in the patient's interests or for other special reasons must be made in a separate document, and the authority must give the reasons why it does not wish that information to be disclosed to the applicant²⁷.

The tribunal must send a copy of the responsible authority's statement to the applicant, excluding any part of the statement furnished by the authority in a separate document²⁸; and if the tribunal receives any comments from the applicant on the authority's statement it must afford the authority an opportunity of considering those comments²⁹.

1 As to the power of tribunals to postpone certain applications see PARA 585 post.

2 In the case of references to the tribunal by the hospital managers or the Secretary of State (see PARAS 567-568 ante), a notification of the reference must be sent: Mental Health Review Tribunal Rules 1983, SI 1983/942, r 29(b). Rule 6 (as amended) then applies as if it referred to the notice of reference or the request for the authority's statement and where a reference is made under the Mental Health Act 1983 s 75(1) (as amended) (see PARA 568 ante) the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 6(2) (see note 13 infra) applies as if the period of time there specified was two weeks instead of three weeks; and on receipt of the authority's statement, the tribunal must give notice of the date, time and place fixed for the hearing to any person whom the tribunal notifies of the proceedings under r 7 (as amended) (see PARA 580 post): r 29(c) (amended by SI 1998/1189). Where a reference is made under the Mental Health Act 1983 s 75(1) (as amended), on receipt of the reference the tribunal must fix a date for the hearing not later than eight, nor earlier than five weeks, from the date on which the reference was received; fix the time and place for the hearing; and give notice of the date, time and place of the hearing to the patient, the responsible authority and the Secretary of State: Mental Health Review Tribunal Rules 1983, SI 1983/942, r 29(cc) (added by SI 1998/1189). As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

3 The 'responsible authority' means: (1) in relation to a patient liable to be detained under the Mental Health Act 1983 in a hospital or registered establishment, the managers (see PARA 439 ante); (2) in relation to a patient subject to guardianship, the responsible local social services authority as defined in s 34(3) (see PARA 475 note 1 ante); and (3) in relation to a patient subject to after-care under supervision (see PARA 528 et seq ante), the health authority or primary care trust (see PARA 414 note 6 ante) which has the duty under s 117 (as amended) (see PARAS 414, 428 ante) to provide after-care services for the patient: Mental Health Review Tribunal Rules 1983, SI 1983/942, r 2(1) (definition amended by SI 1996/314; SI 2002/2469). The rules refer to a mental nursing home, but such homes are now known as registered establishments. For the meaning of 'registered establishment' see PARA 421 ante.

4 For the meaning of 'patient' see PARA 435 ante.

5 For the meaning of 'restricted patient' see PARA 564 note 58 ante.

6 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 4(1), (2). Failure to notify the Secretary of State and send relevant documents to him is such an irregularity as to invalidate the proceedings and cannot be cured under r 28 (see PARA 576 ante): *Campbell v Secretary of State for the Home Department* [1988] AC 120, sub nom *Secretary of State for the Home Department v Oxford Regional Mental Health Review Tribunal* [1987] 3 All ER 8, HL. See also *R (on the application of the Secretary of State for the Home Department) v Mental Health Review Tribunal* [2004] EWHC 650 (Admin), [2004] All ER (D) 193 (Mar) (on the application to the tribunal to discharge absolutely a patient who had been conditionally discharged, where notice had not been given to the Secretary of State as required by the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 4, with the consequence that the Secretary of State was unable to fulfil his duty to submit his views to the

tribunal, the tribunal's decision to discharge the patient absolutely was fundamentally flawed and to be quashed).

7 As to conditionally discharged patients see PARA 570 ante.

8 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 6(1).

A delay in providing the required information resulting in a delay in the tribunal hearing may constitute a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 5(4) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 127, 132), entitling the patient to damages: see *R (on the application of C) v Mental Health Review Tribunal* [2001] EWCA Civ 1110, [2002] 1 WLR 176, (2001) Times, 11 July; *R (on the application of K) v Mental Health Review Tribunal* [2002] EWHC 639 (Admin), [2002] All ER (D) 182 (Apr). See also PARA 590 post.

9 For the meaning of 'nearest relative' see PARA 453 ante.

10 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 6(1)(a), Sch 1 Pt A (amended by SI 2002/2469).

11 As to after-care under supervision see PARA 528 et seq ante.

12 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 6(1)(b), Sch 1 Pt B (amended by SI 1996/314).

13 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 6(2).

14 Ie the provisions of *ibid* r 6(1), (2) do not apply.

15 *Ibid* r 6(3).

16 For the meaning of 'mental disorder' see PARA 402 ante.

17 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 6(3)(a), Sch 1 Pt C.

18 For the meaning of 'hospital' for these purposes see PARA 564 note 4 ante; and see also PARA 417 ante.

19 As to absolute discharge see PARA 570 ante.

20 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 6(3)(b), Sch 1 Pt D.

21 Ie *ibid* r 6(1) does not apply.

22 *Ibid* r 6(3A)(a) (r 6(3A) added by SI 1996/314). The specified information is: (1) the full name, address and age of the patient; (2) the date of the acceptance of the supervision application in respect of the patient; (3) a copy of the original supervision application, details of the after-care services provided, or to be provided, under the Mental Health Act 1983 s 117 (as amended) (see PARAS 414, 428 ante), details of any requirements imposed, or to be imposed, under s 25D(1) (as added) (see PARA 530 ante), a copy of any report furnished under s 25G(3)(b) (as added) (see PARA 532 ante) in relation to renewal of the supervision application and a copy of any record of modification of the after-care services provided; (4) any reclassification of the form of mental disorder from which the patient is recorded as suffering in the supervision application reported in accordance with s 25F(1) (as added and amended) (see PARA 531 ante); (5) the name and address of the person who is (or is to be) the community responsible medical officer (see PARA 529 note 20 ante) and the period during which he has been in charge of the patient's medical treatment (see PARA 552 ante); (6) the name and address of the person who is, or is to be, the patient's supervisor; (7) where a registered medical practitioner (see PARA 460 note 13 ante) other than the community responsible medical officer is or has recently been largely concerned in the treatment of the patient, details of the name and address of that practitioner and the period which the patient has spent under his care; (8) the name and address of any place where the patient, if he has been discharged, is receiving medical treatment; (9) the name and address of the hospital where the patient was detained or liable to be detained when the supervision application was made; (10) the dates of any previous tribunal hearings in relation to the patient since he became subject to after-care under supervision, the decisions reached at such hearings and the reasons given; (11) details of any proceedings in the Court of Protection and of any receivership order made in respect of the patient; (12) the name and address of the patient's nearest relative or of any other person who is exercising that function; and (13) the name and address of any other person who takes a close interest in the patient: Mental Health Review Tribunal Rules 1983, SI 1983/942, Sch 1 Pt E (added by SI 1996/314).

23 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 6(3A)(b) (as added: see note 22 supra). The specified reports are: (1) an up-to-date medical report, prepared for the tribunal by the patient's community responsible medical officer or, if he has not yet left hospital, his responsible medical officer (see PARA 506 note 1 ante), or, where there is none, his last responsible medical officer, including the relevant medical history and a full report on the patient's mental condition; (2) where the patient is subject to after-care under supervision, an

up-to-date report prepared for the tribunal by the patient's supervisor, including reports on the patient's home and family circumstances (including the attitude of the patient's nearest relative or the person so acting and the attitude of any person who plays a substantial part in the care of the patient but is not professionally concerned with any of the after-care services provided to the patient) and his progress in the community whilst subject to after-care under supervision (including an assessment of the effectiveness of that supervision); and (3) where the patient has not yet left hospital, an up-to-date social circumstances report prepared for the tribunal by a person professionally concerned with the nature of the patient's social circumstances, including reports on the patient's home and family circumstances (including the attitude of the patient's nearest relative or the person so acting), the opportunities for employment or occupation and the housing facilities which will be available to the patient upon his discharge from hospital, the availability of community support and relevant medical facilities, and the financial circumstances of the patient: Mental Health Review Tribunal Rules 1983, SI 1983/942, Sch 1 Pt F (added by SI 1996/314).

24 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 6(3A)(c) (as added: see note 22 supra). After-care services are provided under the Mental Health Act 1983 s 117 (as amended): see PARAS 414, 428 ante.

25 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 6(3A)(d) (as added: see note 22 supra). As to after-care requirements see the Mental Health Act 1983 s 25D (as added); and PARA 530 ante.

26 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 6(3A)(e) (as added: see note 22 supra). As to the specified documents see Sch 1 Pt E para 3 (as added); and note 22 head (3) supra.

27 Ibid r 6(4).

28 Ibid r 6(5).

29 Ibid r 12(1).

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

576-594 Procedure

SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705 (amended by SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(4) PROCEDURE/580. Notice to interested persons.

580. Notice to interested persons.

The mental health review tribunal must give notice of the application to other persons interested in the proceedings¹ on receipt of the statement of the responsible authority², or, in the case of a conditionally discharged patient³, the Secretary of State⁴, and inform them of the arrangements for determining the application⁵. On receiving a reference, the tribunal must send notice to the patient and the responsible authority⁶ and to other persons interested⁷.

The provisions of the Domestic Violence, Crime and Victims Act 2004 apply to give the victims of mentally disordered offenders certain information about discharge and conditions of discharge, and allow representations to be made to the tribunal on behalf of the victim regarding any conditions of discharge⁸. The provisions apply where someone is convicted of a sexual or violent crime⁹, or a special verdict is returned in relation to such crime and made subject to a restricted hospital order or limitation or transfer direction under the Mental Health Act 1983¹⁰. There is a duty on the tribunal to provide information regarding discharge to the probation service¹¹ which will be responsible for relaying the information, usually via a victim liaison officer. The tribunal or the Secretary of State informs the officer when an application or reference has been made to a tribunal. There will be contact between the officer and the patient's care team where a victim decides to exercise his rights under the Domestic Violence, Crime and Victims Act 2004.

1 le (1) where the patient is liable to be detained in a registered establishment, the registration authority; (2) where he is under the guardianship of a private guardian, that guardian; (3) where the patient is, or will upon leaving hospital be, subject to after-care under supervision, to the person who appears to be the patient's nearest relative, and the persons who are, or will be, the patient's supervisor and community responsible medical officer, and, in the case of a patient who has not yet left hospital, the person who has prepared the medical report referred to in the Mental Health Review Tribunal Rules 1983, SI 1983/942, Sch 1 Pt F para 1 (as added) (see PARA 579 note 23 head (1) ante); or (4) where the patient's financial affairs are under the control of the Court of Protection, the Court of Protection (see PARA 674 et seq post); (5) where any person other than the applicant is named in the authority's statement as exercising the functions of a nearest relative, that person; (6) if a health authority, primary care trust, NHS trust or NHS foundation trust has the right to discharge the patient under the provisions of the Mental Health Act 1983 s 23(3) (as amended) (see PARA 523 ante), that authority or trust; and (7) any other person who, in the opinion of the tribunal, should have the opportunity of being heard: Mental Health Review Tribunal Rules 1983, SI 1983/942, r 7(a)-(f) (amended by SI 1996/314; SI 1998/1189; SI 2002/2469; SI 2004/696). The rules refer to a mental nursing home, but such homes are now known as registered establishments. For the meaning of 'registered establishment' see PARA 421 ante. For the meaning of 'patient' see PARA 435 ante. For the meaning of 'hospital' for these purposes see PARA 564 note 4 ante; and see also PARA 417 ante. As to after-care under supervision see PARA 528 et seq ante. For the meaning of 'nearest relative' see PARA 453 ante. For the meaning of 'community responsible medical officer' see PARA 529 note 20 ante. For the meanings of 'health authority' and the 'primary care trust' see PARA 414 note 6 ante. As to NHS trusts and NHS foundation trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq.

Heads (4) and (7) supra do not apply to the nearest relative of a restricted patient: see *R (on the application of H) v Mental Health Review Tribunal* [2000] 1 MHLR 2037.

Caution is needed in regard to the transmission of information about the patient and his or her condition to the patient's nearest relative as this could constitute violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 8 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 149 et seq): see *JT v United Kingdom* [2000] 1 FLR 909, [2000] Fam Law 533, ECtHR.

2 For the meaning of 'responsible authority' see PARA 579 note 3 ante.

3 As to conditionally discharged patients see PARA 570 ante.

4 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

5 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 7 (amended by SI 1998/1189). Notices and other documents to be sent or given to any person may be sent by prepaid post or delivered to the person's last known address and, if sent or given to the authorised representative of any person, are deemed to be sent or given to that person: Mental Health Review Tribunal Rules 1983, SI 1983/942, r 27.

6 Ibid r 29(b). However, where the reference is made by the responsible authority, the tribunal must instead send a request for the authority's statement (see PARA 579 ante): r 29(b) proviso.

7 Ibid r 7; applied by r 29(c) (amended by SI 1998/1189). On receipt of the authority's statement, the tribunal must give notice of the date, time and place fixed for the hearing to any person whom the tribunal notifies of the proceedings under the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 7 (as amended): see note 1 supra.

8 See the Domestic Violence, Crime and Victims Act 2004 ss 35-45; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 340 et seq.

9 See ibid s 45(2).

10 le under the Mental Health Act 1983 s 37(4) (as amended) (see PARA 491 ante), s 41(1) (see PARA 496 ante), s 45A(3) (as added) (see PARA 490 ante), s 47(1) (as amended) (see PARA 535 ante), s 49(2) (see PARA 488 ante).

11 As to the probation service see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARA 1833 et seq.

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

576-594 Procedure

SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705 (amended by SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(4) PROCEDURE/581. Procedure in assessment cases.

581. Procedure in assessment cases.

An assessment application¹ must be made to the tribunal in writing signed by the patient². It should state wherever possible the name of the patient, the address of the hospital or registered establishment³ where he is detained, and the name and address of his nearest relative and of any representative authorised by him⁴.

On receipt of the application, the tribunal must fix a date, time and place for the hearing, such date being not later than seven days from the date on which the application was received; it must give notice of the hearing to the patient and to the responsible authority, the nearest relative (where practicable) and any other person it considers should have an opportunity of being heard⁵. The responsible authority must provide for the tribunal copies of the patient's admission papers⁶ and certain other prescribed information⁷. Copies must be made available to the patient except where they are withheld on the ground that disclosure would affect the patient's health or welfare⁸.

The other rules⁹ relating to tribunal procedure apply to these cases as they apply to others, with some modifications¹⁰.

1 'Assessment application' means an application by a patient who is detained for assessment under the Mental Health Act 1983 s 2 (see PARA 460 ante) and who is entitled to apply to a tribunal under s 66(1)(a) (see PARA 564 head (1) ante): Mental Health Review Tribunal Rules 1983, SI 1983/942, r 2(1).

2 Ibid r 30(1). The procedure is different in view of the time limits set by the Mental Health Act 1983 ss 2(4), 66(1)(a): see note 1 supra. For the meaning of 'patient' see PARA 435 ante.

3 The rules refer to a mental nursing home, but such homes are now known as registered establishments. For the meaning of 'registered establishment' see PARA 421 ante.

4 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 30(2). For the meaning of 'nearest relative' see PARA 453 ante. Any information not included should in so far as is practicable be provided by the responsible authority (see PARA 579 note 3 ante): r 30(3).

5 Ibid r 31.

6 'Admission papers' means the application for admission for assessment under the Mental Health Act 1983 s 2 (see PARA 460 ante), and the written recommendations of the two registered medical practitioners upon which it is founded: Mental Health Review Tribunal Rules 1983, SI 1983/942, r 2(1). For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.

7 I.e. such of the information specified in ibid Sch 1 Pt A (as amended) as is within its knowledge and can reasonably be provided in the time available, and such of the reports specified in Sch 1 Pt B as can reasonably be provided in the time available: r 32(1). As to that information and those reports see PARA 579 ante. As to the information, documents and reports which the responsible authority and the Secretary of State must provide in respect of patients who are subject to, or will be subject to, after-care under supervision see Sch 1 Pts E, F (as added); and PARA 579 ante. As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

8 Ibid r 32(2), (3). The responsible authority must indicate which of the papers it considers should be withheld on these grounds and give reasons for its belief.

9 I.e. ibid rr 5, 8, 10-28 (as amended).

10 Ibid r 33. See PARAS 582-584 post.

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

576-594 Procedure

SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705 (amended by SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(4) PROCEDURE/582. Disclosure of documents.

582. Disclosure of documents.

The tribunal must send, as soon as practicable, a copy of every document received which is relevant to the application to the applicant and (if he is not the applicant) the patient¹, to the responsible authority² and, in the case of a restricted patient³, to the Secretary of State⁴. If any document received by the tribunal has not been copied to the applicant or patient, the tribunal must consider whether disclosure of such documents⁵ would adversely affect the health or welfare of the patient or others and if satisfied that it would must record in writing its decision not to disclose them⁶. The tribunal must disclose withheld information to the authorised representative of the applicant or patient, if that representative is a barrister or solicitor⁷, or a registered medical practitioner⁸, or in the opinion of the tribunal, is a suitable person by virtue of his experience or professional qualification⁹. Disclosure to the above is on terms that such information must not be disclosed either directly or indirectly to the applicant or patient or to any other person¹⁰ without the authority of the tribunal, or used otherwise than in connection with the application¹¹.

1 For the meaning of 'patient' see PARA 435 ante.

2 For the meaning of 'responsible authority' see PARA 579 note 3 ante.

3 For the meaning of 'restricted patient' see PARA 564 note 58 ante.

4 Mental Health Tribunal Rules 1983, SI 1983/942, r 12(1). Any of these persons may submit comments in writing to the tribunal. As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

5 I.e. including those withheld by either the responsible authority or the Secretary of State in accordance with *ibid* r 6 (as amended): see PARA 579 ante. In assessment cases (see PARA 581 ante) this refers to part of the admission papers or other documents supplied in accordance with r 32 (see PARA 581 ante) being withheld: r 33(a).

6 *Ibid* r 12(2). A patient's representative has the right to examine the patient's medical file, but it is not necessary for the patient to be informed of all the evidence or that he be allowed access to all of the information on his file: see *Winterwerp v Netherlands* (1981) 4 EHRR 228, ECtHR. See also *Niklova v Bulgaria* [2001] EHRR 3.

7 Mental Health Tribunal Rules 1983, SI 1983/942, r 12(3)(a).

8 *Ibid* r 12(3)(b). For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.

9 *Ibid* r 12(3)(c).

10 Eg an independent psychiatrist.

11 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 12(3). It may be contempt of court to break this rule: see *Pickering v Associated Newspaper Holdings plc* [1991] 2 AC 370, sub nom *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 1 All ER 622, HL.

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in

relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

576-594 Procedure

SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705 (amended by SI 2009/3348).

582 Disclosure of documents

TEXT AND NOTES--For guidance in relation to an application before the First-tier Tribunal for the disclosure of a patients medical records see *Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC), (2010) 111 BMLR 1.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(4) PROCEDURE/583. Medical examination and interview with patient.

583. Medical examination and interview with patient.

At any time before the hearing of the application, the medical member¹ of the mental health review tribunal considering an application must examine the patient² and take such other steps as he considers necessary to form an opinion of the patient's mental condition³; and for this purpose the patient may be seen in private and his medical records may be examined⁴.

The tribunal (or one of the members) may interview a patient at any time before the application is determined and must do so if the patient requests this; the interview may take place in the absence of any other person and must do so if the patient so requests⁵.

1 As to the appointment of this member see PARA 561 ante.

2 For the meaning of 'patient' see PARA 435 ante. There is no definition of 'examine'.

3 If there is more than one medical member of a tribunal all of them may perform this duty but one must do so. Any evidence or information which has only been made available to the medical member must be shown at least to the patient's representatives: *R v Mental Health Review Tribunal, ex p Clatworthy* [1985] 3 All ER 699. Although guided by the medical member, it is the tribunal as a whole that determines the issues relating to the patient's medical condition: *R v Trent Mental Health Review Tribunal, ex p Ryan* CO/445/91. As to the issue of bias see *R (on the application of D) v West Midlands and North West Mental Health Review Tribunal* [2002] EWCA Civ 311, [2004] All ER (D) 339 (Mar) (bias was alleged by the patient where the medical member was employed by the same trust as the one responsible for the hospital in which he was detained; the court said that the test of apparent bias was whether a fair-minded and informed observer who is neither complacent nor unduly sensitive or suspicious would conclude that there was a real possibility that the tribunal was not balanced). See also PARA 561 ante.

The dual role of the medical member as fact finder and decision maker has given rise to fears that he would have a preconceived opinion as to the application being determined and was therefore not impartial: see *S v Mental Health Tribunal* [2002] EWHC 2522 (Admin), (2002) Times, 6 December (where the court held that the medical member was not required to form an opinion, forming a provisional opinion does not give rise to unfairness and so this rule is not inconsistent with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 5(4) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 127, 132)). See also *DN v Switzerland (Application 27154/95)* (2001) 63 BMLR 221, [2001] ECHR 27154/95. The practice endorsed by the regional chairmen of the tribunal is that where the medical member's view differs significantly from that of the responsible medical officer (see PARA 569 ante), it is essential that this opinion is disclosed to the patient and his representative at the outset of the hearing. Furthermore where the medical member has formed a view then this must also be communicated to the patient and the representative. See also *R (on the application of Ashworth Hospital Authority) v Mental Health Review Tribunal for West Midlands and Northwest Region* [2002] EWCA Civ 923, [2003] 1 WLR 127; *Watson v General Medical Council* [2005] EWHC 1896 (Admin), [2005] All ER (D) 113 (Aug).

4 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 11 (amended by SI 1996/1314). The medical member may take such copies as he may require for use in connection with the application. In the case of a patient subject to after-care under supervision (see PARA 528 et seq ante), this provision applies to other records relating to after-care services provided under the Mental Health Act 1983 s 117 (as amended) (see PARAS 414, 428 ante).

5 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 22(2).

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in

relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

576-594 Procedure

SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705 (amended by SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(4) PROCEDURE/584. Consideration of two or more applications together.

584. Consideration of two or more applications together.

The mental health review tribunal may consider more than one application in respect of a patient¹ at the same time and may for this purpose adjourn the proceedings relating to any application².

1 For the meaning of 'patient' see PARA 435 ante.

2 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 18(1). Where the tribunal considers more than one application in respect of the patient at the same time, each applicant (if more than one) has the same rights under the rules as if he would have if he were the only applicant: r 18(2).

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

576-594 Procedure

SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705 (amended by SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(4) PROCEDURE/585. Postponed consideration of further applications.

585. Postponed consideration of further applications.

Where an application by or in respect of a patient¹ has been considered and determined by a mental health review tribunal for the same or any other area, the tribunal or its chairman may postpone consideration of a further application by or in respect of that patient until a time not later than six months from the date on which the previous application was determined or the expiry of the current period of detention, whichever is the earlier². Powers of postponement must not be exercised unless the tribunal is satisfied that it is in the patient's interests³. Where consideration of an application is postponed the tribunal must give written reasons for postponement, stating the period for which it is postponed, to all the parties, and in the case of a restricted patient⁴, to the Secretary of State⁵. Consideration of the postponed application must take place before the end of that period unless the application is withdrawn or deemed to have been withdrawn⁶. However, the power of postponement may not be exercised if the previous application was determined before a break or change in the authority for the patient's detention or guardianship or his being (or being about to be) subject to after-care under supervision⁷. Furthermore it may not be exercised if the new application: (1) is in respect of reclassification of patients or patients subject to after-care under supervision⁸; or (2) is in respect of renewal of authority for detention or renewal of after-care under supervision⁹, unless the previous application was made more than three months after the patient's admission to hospital, reception into guardianship or becoming subject to after-care under supervision; or (3) is in respect of a restriction on discharge by the nearest relative¹⁰.

Where a new application is made in respect of a patient and is not postponed under the above power, the tribunal may direct that any postponed application in respect of the same patient must be considered and determined at the same time as the new application¹¹.

1 For the meaning of 'patient' see PARA 435 ante.

2 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 9(1). This rule does not apply to any reference: r 29(a).

3 Ibid r 9(2).

4 For the meaning of 'restricted patient' see PARA 564 note 58 ante.

5 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 9(4). As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

6 *Ie* under *ibid* r 9(6): r 9(5).

7 *Ibid* r 9(3)(d) (amended by SI 1996/314). As to after-care under supervision see PARA 528 et seq ante. A break or change in the authority for the detention or guardianship or his being (or being about to be) subject to after-care under supervision is deemed to have occurred only: (1) on the patient's admission to hospital in pursuance of an application for treatment or of a hospital order without an order restricting discharge; (2) on his reception into guardianship in pursuance of a guardianship application or guardianship order; (3) on the application to him of the provisions of the Mental Health Act 1983 Pt II (ss 2-34) (as amended), Pt III (ss 35-55) (as amended), as if he had been admitted or received as in head (1) or head (2) supra, following the making of a transfer direction or the ceasing of effect of a transfer direction or order or direction restricting his discharge; (4) on his transfer from guardianship to hospital in pursuance of regulations made under s 19 (as amended) (see PARAS 515-516 ante); or (5) on his ceasing to be subject to after-care under supervision on his reception into guardianship in accordance with s 25H(5)(b) (as added) (see PARA 533 ante): Mental Health Review Tribunal Rules 1983, SI 1983/942, r 9(7) (amended by SI 1996/314). As to guardianship see PARA 469 et seq ante. For the meaning of 'hospital' for these purposes see PARA 564 note 4 ante; and see also PARA 417 ante. As to hospital orders generally see PARA 491 et seq ante. For the meaning of 'transfer direction' see PARA 535 note 11 ante.

8 le an application under the Mental Health Act 1983 s 66(1)(d) or (gb) (as added) (see PARA 564 ante):
Mental Health Review Tribunal Rules 1983, SI 1983/942, r 9(3)(a) (amended by SI 1996/314).

9 le an application under the Mental Health Act 1983 s 66(1)(f) or (gc) (as added) (see PARA 564 ante):
Mental Health Review Tribunal Rules 1983, SI 1983/942, r 9(3)(b) (amended by SI 1996/314).

10 le an application under the Mental Health Act 1983 s 66(1)(g) (see PARA 564 ante): Mental Health Review
Tribunal Rules 1983, SI 1983/942, r 9(3)(c).

11 Ibid r 9(6).

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

576-594 Procedure

SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705 (amended by SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(4) PROCEDURE/586. Transfer of proceedings.

586. Transfer of proceedings.

Where an application has not been disposed of by the members of the mental health review tribunal appointed for the purpose and the chairman of the tribunal is of the opinion that it is not practicable or not possible without undue delay for consideration of the application to be completed by those members, he must make arrangements for the application to be disposed of by other members of the tribunal¹.

Where a patient² in respect of whom an application is pending³ moves within the jurisdiction of another tribunal, the proceedings must, if the chairman of the tribunal to which the application was made so directs, be transferred to the tribunal within the jurisdiction of which the patient has moved⁴.

1 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 17(1).

2 For the meaning of 'patient' see PARA 435 ante.

3 A pending application means an application in which some proceeding may still be taken: see *Re Clagett's Estate, Fordham v Clagett* (1882) 20 ChD 637 at 653, CA, per Jessel MR.

4 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 17(2). Notice of the transfer must be given to the parties and in the case of a restricted patient (see PARA 564 note 58 ante) to the Secretary of State: r 17(2). As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

576-594 Procedure

SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705 (amended by SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(4) PROCEDURE/587. Representation.

587. Representation.

Any party¹ may be represented by any person duly authorised in that behalf² who is not himself liable to be detained or subject to guardianship³ or after-care under supervision⁴ or receiving treatment for mental disorder⁵ at the same hospital⁶ or registered establishment⁷ as the applicant⁸. Unless the mental health review tribunal otherwise directs, a patient or other person appearing before the tribunal may be accompanied by such other persons as he wishes⁹.

1 'Party' means the applicant, the patient, the responsible authority, and any other person to whom notice of the application has been given or who is added as a party by direction of the tribunal: Mental Health Review Tribunal Rules 1983, SI 1983/942, r 2(1).

The responsible medical officer (see PARA 569 ante) may wish to represent the hospital authority which bears the burden of proving its case. Practice varies, but this should be clarified at the outset; advance notice is sometimes given. In this role the responsible medical officer should be given an opportunity to question witnesses and make a closing submission: *R (on the application of Mersey Care NHS Trust) v Mental Health Review Tribunal* [2003] EWHC 1182 (Admin), [2003] All ER (D) 120 (May). If the Secretary of State is not represented in any application concerning a restricted patient the tribunal should inquire as to whether notice of the application has been given: see *R v Oxford Mental Health Review Tribunal, ex p Secretary of State for the Home Department* [1986] 3 All ER 239, CA. The Law Society has published guidelines for solicitors: 'Representation at Mental Health Review Tribunals: Guidelines for Legal Representatives' (2004). As to the Law Society see LEGAL PROFESSIONS vol 65 (2008) PARA 604 et seq.

2 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 10(1).

3 As to guardianship generally see PARA 469 et seq ante.

4 As to after-care under supervision see PARA 528 et seq ante.

5 For the meaning of 'mental disorder' see PARA 402 ante.

6 For the meaning of 'hospital' for these purposes see PARA 564 note 4 ante; and see also PARA 417 ante.

7 The rules refer to a mental nursing home, but such homes are now known as registered establishments. For the meaning of 'registered establishment' see PARA 421 ante.

8 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 10(1) (amended by SI 1996/314). See also the Access to Justice Act 1999 Pt I (ss 1-26) (as amended); and LEGAL AID vol 65 (2008) PARA 1 et seq. All patients are entitled to public funding for legal representation before a mental health review tribunal. An authorised representative must notify the tribunal of his authorisation and postal address: Mental Health Review Tribunal Rules 1983, SI 1983/942, r 10(2). If the patient does not appoint a representative and does not desire to conduct his own case, the tribunal may appoint a person to act as an authorised representative: r 10(3). Notices and documents must be sent to the authorised representative: r 10(4), (5).

9 Ibid r 10(6). This is in addition to any representative he may have authorised.

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

576-594 Procedure

SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705 (amended by SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(4) PROCEDURE/588. Evidence.

588. Evidence.

For the purpose of obtaining information, the mental health review tribunal may take evidence on oath¹ and subpoena any witness to appear before it or to produce documents², but no person may be compelled to give any evidence or to produce any document which he could not be compelled to give or produce on the trial of a claim³. The tribunal is specifically empowered to receive in evidence any document or information notwithstanding that it would not be admissible in a court of law⁴.

The tribunal may adjourn the hearing of any evidence or representations, or the consideration of an application, to such date as it may determine⁵. The tribunal may give such directions as it thinks fit to ensure the speedy and just determination of the application⁶. It may also call for such further information and reports as it may think desirable⁷.

1 It is not common practice to administer oaths in tribunal hearings.

2 For this purpose, the president of the tribunal has the powers of an arbitrator under the Arbitration Act 1996 s 38(5): see the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 14(1). See also ARBITRATION vol 2 (2008) PARA 1248. The Arbitration Act 1996 Pt 1 (ss 1-84) only applies to the proceedings of a mental health review tribunal so far as its provisions are expressly applied by the rules relating to such tribunals: Mental Health Act 1983 s 78(9) (amended by the Arbitration Act 1996 s 107(1), Sch 3 para 40).

3 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 14(1). As to privilege in civil claims see CIVIL PROCEDURE vol 11 (2009) PARA 970 et seq.

4 Ibid r 14(2).

5 Ibid r 16(1). See PARA 593 post. On an application by a restricted patient, this provision cannot be used to adjourn the proceedings so as to monitor the patient's progress in the hope that a projected course of treatment will eventually enable the tribunal to discharge the patient: *R v Mental Health Review Tribunal, ex p Secretary of State for the Home Department* (1987) Times, 25 March. See also PARA 570 note 20 ante.

6 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 13.

7 Ibid r 15(1). Rule 12 (see PARA 582 ante) applies to disclosure of that information: r 15(2).

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

576-594 Procedure

SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705 (amended by SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(4) PROCEDURE/589. Expenses of parties and witnesses.

589. Expenses of parties and witnesses.

The mental health review tribunal may pay allowances in respect of travelling expenses, subsistence and loss of earnings to: (1) any person attending the tribunal as an applicant or witness; (2) the patient¹ who is the subject of the proceedings if he attends otherwise than as the applicant or a witness; (3) any person (other than counsel or a solicitor) who attends as the representative of an applicant².

1 For the meaning of 'patient' see PARA 435 ante.

2 Mental Health Act 1983 s 78(7).

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

576-594 Procedure

SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705 (amended by SI 2009/3348).

589 Expenses of parties and witnesses

TEXT AND NOTE 2--Reference to counsel or solicitor now to an authorised person (within the meaning of the Mental Health Act 1983 Pt III (ss 35-55) (see s 55(1); and PARA 489): s 78(7) (amended by Legal Services Act 2007 Sch 21 para 60).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(4) PROCEDURE/590. Hearings.

590. Hearings.

The mental health review tribunal must give at least 14 days' notice of the date, time and place fixed for the hearing¹. The tribunal may conduct the hearing in such manner as it considers most suitable bearing in mind the health and interests of the patient² and must, so far as it appears to it appropriate, seek to avoid formality in its proceedings³.

¹ Mental Health Review Tribunal Rules 1983, SI 1983/942, r 20. This rule does not apply to assessment cases (see PARA 581 ante): r 33(c). Nor does the rule apply to references made under the Mental Health Act 1983 s 75(1) (as amended) (see PARA 568 ante): Mental Health Review Tribunal Rules 1983, SI 1983/942, r 29(a) (amended by SI 1998/1189). Where a reference is made under the Mental Health Act 1983 s 75(1) (as amended) the tribunal must, on receipt of the authority's statement, give notice of the date, time and place fixed for the hearing to any person whom the tribunal notifies of the proceedings under the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 7 (as amended) (see PARA 580 ante): r 29(c)(ii) (added by SI 1998/1189). As to delay in fixing a tribunal hearing and possible violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 5(4) see PARA 579 note 8 ante.

² For the meaning of 'patient' see PARA 435 ante.

³ Mental Health Review Tribunal Rules 1983, SI 1983/942, r 22(1). As to the conduct of hearings see further PARA 592 post.

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

576-594 Procedure

SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705 (amended by SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(4) PROCEDURE/591. Privacy of hearings.

591. Privacy of hearings.

At all hearings the mental health review tribunal must sit in private, unless the applicant¹ requests a hearing in public and the tribunal is satisfied that this would not be detrimental to the patient's² interests and would not be undesirable for any other reason³. When sitting in private the tribunal may admit to the hearing any person or class of persons on such terms and conditions as it considers appropriate⁴. It may also exclude any person or class of persons it thinks fit; and may exclude the patient himself or any other person while evidence is being heard if, in its opinion, it would be undesirable in the patient's interests or for other special reasons for the patient or such other person to be present⁵. The tribunal must inform the excluded persons of its reasons for exclusion and record those reasons in writing⁶.

Except in so far as the tribunal may direct, information about any proceedings before the tribunal or the names of persons concerned in the proceedings must not be made public⁷.

1 As to applicants see PARA 564 ante.

2 For the meaning of 'patient' see PARA 435 ante.

3 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 21(1). Where the tribunal refuses a request for a public hearing or directs the discontinuance of a public hearing, it must record its reasons in writing and inform the patient of those reasons: r 21(2). See *R (on the application of Mersey Care Trust) v Mental Health Review Tribunal* [2004] EWHC 1749 (Admin), [2005] 2 All ER 820 (whether a public hearing is contrary to the patient's interests). Hearings are almost exclusively held in private, with public hearings being an exceptional occurrence; and the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 21(1) creates a presumption that tribunal hearings will be in private.

4 Ibid r 21(3).

5 Ibid r 21(4). However, nothing in this rule prevents a member of the Council on Tribunals from attending the hearing in his capacity as such: r 21(6). As to the Council on Tribunals see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARAS 55-57.

6 Ibid r 21(2).

7 Ibid r 21(5). By virtue of the Contempt of Court Act 1981 s 19 and the Administration of Justice Act 1960 s 12(1)(b) (prospectively amended), a mental health review tribunal is a 'court' for the purposes of the law of contempt of court. The combined effect of the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 21(5) and the Administration of Justice Act 1960 s 12 (as amended; prospectively amended) (see CONTEMPT OF COURT vol 9(1) (Reissue) PARAS 430-431) is that, where a tribunal sits in private, unauthorised publication of the evidence, the recorded reasons for the tribunal's decision so far as these disclose the evidence and other material on which this is based, and any conditions imposed by the tribunal, is prohibited; but the fact that an application or reference has been made to a tribunal concerning a named patient, the date, time and place of the tribunal hearing, and any direction made by the tribunal to discharge the patient may be published: *Pickering v Associated Newspaper Holdings plc* [1991] 2 AC 370, sub nom *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 1 All ER 622, HL, overruling *A-G v Associated Newspapers Group plc* [1989] 1 All ER 604, [1989] 1 WLR 322, on this point. See CONTEMPT OF COURT vol 9(1) (Reissue) PARAS 425, 431, 453. See also *R (on the application of Mersey Care Trust) v Mental Health Review Tribunal* [2004] EWHC 1749 (Admin), [2005] 2 All ER 820.

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

576-594 Procedure

SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705 (amended by SI 2009/3348).

591 Privacy of hearings

NOTE 4--See *R (on the application of B) v South Region Mental Health Review Tribunal* [2008] All ER (D) 86 (Aug) (tribunal had power to admit nurse to attend mental health patient's review hearing).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(4) PROCEDURE/592. Conduct of hearings.

592. Conduct of hearings.

At the beginning of the hearing the president of the mental health review tribunal must explain the manner of proceeding which the tribunal proposes to adopt¹. Any party, and with the permission of the tribunal, any other person, may appear and take such part in the proceedings as the tribunal thinks proper; the tribunal must hear and take evidence from the applicant² (and, where he is not the applicant, the patient³), and the responsible authority⁴, who may hear each other's evidence, and examine and cross-examine witnesses⁵. The applicant (and where he is not the applicant, the patient) must be given a further opportunity to address the tribunal when all the evidence has been given⁶.

1 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 22(3).

2 As to applicants see PARA 564 ante.

3 For the meaning of 'patient' see PARA 435 ante.

4 For the meaning of 'responsible authority' see PARA 579 note 3 ante.

There is no obligation on the responsible medical officer (see PARA 569 ante) to give evidence and another doctor involved in the patient's treatment may do so to present his own independent evaluation and up-to-date information: see *R v Mental Health Review Tribunal, London North and East, ex p Manns* [1999] 1 MHLR 101. As to the effect of the unavailability of doctors for cross-examination see *R (on the application of Ashworth Hospital Authority) v Mental Health Review Tribunal for West Midlands and Northwest Region* [2002] EWCA Civ 923, [2003] 1 WLR 127.

5 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 22(4).

6 Ibid r 22(5).

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

576-594 Procedure

SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705 (amended by SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(4) PROCEDURE/593. Adjournment of hearings.

593. Adjournment of hearings.

Where it appears desirable to the mental health review tribunal that further information on any point should be obtained, it may adjourn for the information to be obtained in such manner as it may direct or for the applicant¹ or any other person concerned to produce the information². Where the applicant (or patient³, where he is not the applicant) or the responsible authority⁴ requests a resumption of the hearing, the hearing must be resumed provided that the tribunal is satisfied that it would be in the interests of the patient⁵. Before resuming a hearing, 14 days' notice (or such notice as all parties agree) must be given to all the parties and, in the case of a restricted patient⁶, to the Secretary of State⁷, of the date, time and place of the resumed hearing⁸.

1 As to applicants see PARA 564 ante.

2 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 16(1), (2).

It is not good practice to adjourn a hearing without any indication as to when it will resume. Experts may meet at an early stage to identify and narrow down any differences of opinion. No adjournment should be granted without giving the patient's representatives an opportunity to be heard. Reasons for adjourning should be given. The tribunal has power to adjourn of its own motion to obtain information which it regards as necessary for the purpose of doing justice to the case and in doing so it must balance the need for the information against the inevitable delay in determining the application: see eg *R (on the application of X) v Mental Health Review Tribunal* [2003] All ER (D) 160 (May).

A tribunal may adjourn to enable a care plan to be produced by the proper authorities. It may call for reports (ie under the Mental Health Review Tribunal Rules 1983, SI 1983/942, r 15: see PARAS 576, 588) and summon witnesses, eg directors of social services, or chairpersons of health authorities (ie under r 14: see PARAS 576, 588 ante). However, the power to adjourn only applies to functions authorised by the Mental Health Act 1983 (eg whether to discharge or not) and not to extra-statutory powers (eg recommendations for restricted patients): see *R v Mental Health Review Tribunal, ex p Hall* [1999] 4 All ER 883, 51 BMLR 117, CA; *R v South West Thames Mental Health Review Tribunal, ex p Demetri* (2 July 1997) Lexis. There can be no adjournment to monitor a patient's progress: see PARA 570 ante. For these purposes, 'hearing' means proceedings before a formal decision: see *R (on the application of X) v Mental Health Review Tribunal* supra. As to exercise of the adjournment power due to the absence of a doctor from the hearing see *R (on the application of Ashworth Hospital Authority) v Mental Health Review Tribunal for West Midlands and Northwest Region* [2002] EWCA Civ 923, [2003] 1 WLR 127.

3 For the meaning of 'patient' see PARA 435 ante.

4 For the meaning of 'responsible authority' see PARA 579 note 3 ante.

5 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 16(3).

6 For the meaning of 'restricted patient' see PARA 564 note 58 ante.

7 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

8 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 16(4). In assessment cases (see PARA 581 ante) such notice must be given as is reasonably practicable: r 33(b).

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in

relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

576-594 Procedure

SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705 (amended by SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/4. MENTAL HEALTH REVIEW TRIBUNALS/(4) PROCEDURE/594. Decisions of the tribunal, further consideration and communication of decisions.

594. Decisions of the tribunal, further consideration and communication of decisions.

The decision of a mental health review tribunal, including a provisional decision¹ or a decision with recommendations², is the decision of the majority, the president, in the event of an equality of votes, having a second or casting vote³. A tribunal's decision must be recorded in writing and signed by the president and must give the reasons for the decision; in particular, where the tribunal has relied upon any of certain matters⁴ it must state its reasons for being satisfied as to those matters⁵. The decision of the tribunal may be announced immediately after the hearing of the case and, subject to the exception below, must be communicated in writing, with the reasons for the decision, to all parties, and in the case of an application by a restricted patient⁶, to the Secretary of State, within seven days of the hearing⁷. If, however, the tribunal considers that full disclosure of the recorded reasons for its decision would adversely affect the health and welfare of the patient or others, it may instead communicate its decision to the patient⁸ in such manner as it thinks appropriate and impose on other parties conditions as to disclosure to the patient; where the patient's representative is a solicitor, barrister, registered medical practitioner⁹ or some other suitable person the full recorded grounds for the decision must be disclosed to that person¹⁰.

1 'Provisional decision' includes a deferred direction for conditional discharge under the Mental Health Act 1983 s 73(7) (see PARA 570 ante) and a notification to the Secretary of State in accordance with s 74(1) (as amended) (see PARA 571 ante): Mental Health Review Tribunal Rules 1983, SI 1983/942, r 2(1). Where a tribunal makes a provisional decision, any further decision may be made without a hearing: r 25(1). As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

2 'Decision with recommendations' means a decision in accordance with the Mental Health Act 1983 s 72(3) (a) or s 72(3A)(a) (as added) (see PARA 569 ante): Mental Health Review Tribunal Rules 1983, SI 1983/942, r 2(1) (definition amended by SI 1996/314). The tribunal must specify a period at the end of which the recommendations must be complied with and must consider the case further in the event of non-compliance; proceedings may be reconvened on 14 days' notice (or such shorter notice as all parties may consent to) of the date, time and place fixed for the hearing: Mental Health Review Tribunal Rules 1983, SI 1983/942, rr 24(4), 25(2) (r 25(2) amended by SI 1998/1189).

3 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 23(1), (3).

4 I.e. the matters set out in the Mental Health Act 1983 s 72(1) (as substituted), s 72(4), s 72(4A) (as added) (see PARA 569 ante) or s 73(1), (2) (see PARA 570 ante).

5 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 23(2) (amended by SI 1996/314). A tribunal must give proper and adequate reasons for its decision. Parties must be able to tell why one has lost and one has won. The adequacy of reasons will depend on the nature of the case. Every factor weighed need not be recorded and explained, but vital issues must be identified and set out. An explanation as to why the evidence of one expert was preferred over another should be provided. The reasons must be read as a whole and in a common-sense, non-legalistic fashion. It is not sufficient for the reasons to merely recite the evidence or statutory criteria. The quality of reasons will take account of the fact that they are addressed to an informed audience. It must be possible to discern the issues to which the reasons are directed. See *Bone v Mental Health Review Tribunal* [1985] 3 All ER 330. See also *R v Mental Health Review Tribunal, ex p Clatworthy* [1985] 3 All ER 699; *R v Mental Health Review Tribunal, ex p Pickering* [1986] 1 All ER 99; *L v Devon County Council* [2001] EWHC 958 (Admin), [2001] All ER (D) 155 (Nov); *R (on the application of Epsom and St Helier NHS Trust) v Mental Health Review Tribunal* [2001] EWHC 101 (Admin), [2001] 1 MHLR 8; *R (on the application of Ashworth Hospital Authority) v Mental Health Review Tribunal for West Midlands and Northwest Region* [2002] EWCA Civ 923, [2003] 1 WLR 127; *R (on the application of Li) v Mental Health Review Tribunal* [2004] EWHC 51 (Admin), [2004] All ER (D) 173 (Jan); *R (on the application of the Secretary of State for the Home Department) v Mental Health Review Tribunal* [2004] EWHC 650 (Admin), [2004] All ER (D) 193 (Mar); *R (on the application of the*

Secretary of State for the Home Department) v Mental Health Review Tribunal [2004] EWHC 1029 (Admin), [2004] All ER (D) 127 (Apr); *R (on the application of the Secretary of State for the Home Department) v Mental Health Review Tribunal* [2005] All ER (D) 192 (Apr). The facts and circumstances taken into account by a tribunal in reaching its decision are material for any re-sectioning process that is undertaken shortly after any discharge: see *R (on the application of Von Brandenburg (aka Hanley)) v East London and the City Mental Health Trust* [2003] UKHL 58, [2004] 1 All ER 400.

6 For the meaning of 'restricted patient' see PARA 564 note 58 ante.

7 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 24(1). In assessment cases (see PARA 581 ante), the decision must be communicated within three days: r 33(d).

8 For the meaning of 'patient' see PARA 435 ante.

9 For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.

10 Mental Health Review Tribunal Rules 1983, SI 1983/942, r 24(2).

UPDATE

560-594 Mental Health Review Tribunals

The functions of mental health review tribunals are transferred to the First-tier Tribunal, in relation to England, and to the Mental Health Review Tribunal for Wales, in relation to Wales; and appeals from those tribunals lie to the Upper Tribunal: see Transfer of Tribunal Functions Order 2008, SI 2008/2833.

576-594 Procedure

SI 1983/942 replaced: Mental Health Review Tribunal for Wales Rules 2008, SI 2008/2705 (amended by SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(1) IN GENERAL/595. Introduction.

5. MENTAL DISORDER AND LEGAL INCAPACITY

(1) IN GENERAL

595. Introduction.

Questions of capacity, for the most part, are determined by the court or jury under the common law and in light of any relevant presumptions¹.

However, as from a day to be appointed², Part 1 of the Mental Capacity Act 2005³ applies with a new regime in relation to persons who lack capacity⁴. The Mental Capacity Act 2005 places on a statutory footing: (1) the developments of the common law in relation to treatment and welfare decisions for those who are incapacitated, and their best interests; (2) the previously uncertain jurisdiction of the High Court under its inherent powers in relation to such matters; and (3) advance decisions refusing medical treatment. Nothing in the Mental Capacity Act 2005 expressly overrules the common law and indeed concepts framed in the common law have been adopted in relation to definitions of 'capacity' and 'best interests'⁵; and the courts may well look to the common law in interpreting the provisions of the Act⁶. The Act's scheme for decision-making relating to treatment and welfare also applies to decisions in relation to property and affairs⁷.

Under the Mental Capacity Act 2005, decisions relating to a patient's welfare and property and affairs may be taken by the donee of a lasting power of attorney⁸, the new Court of Protection or the court-appointed deputy⁹. Independent mental capacity advocates may act in certain prescribed situations¹⁰.

1 As to mental disorder and mental incapacity see PARA 596 post. As to any applicable presumptions see PARA 597 post. As to proof of capacity or otherwise see PARA 598 post. As to the law on civil capacity see PARAS 600-618 post.

2 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

3 *Id* *ibid* Pt 1 (ss 1-44).

4 As to *ibid* ss 1-14 (principles, capacity and related matters, best interests, lasting powers of attorney) and ss 22-44 (powers of the court in regard to lasting powers of attorney, advance decisions to refuse treatment, excluded decisions, restrictions on intrusive research, independent mental capacity advocate service, codes of practice and ill-treatment or neglect) see PARAS 641-670, 768 post. As to ss 15-21 (general powers of the court and appointment of deputies) see PARAS 756-760 post. As to codes of practice see PARAS 645-646 post.

As to the interrelation between the provisions of the Mental Health Act 1983 and the Mental Capacity Act 2005 see PARA 406 ante.

5 See PARAS 641-642 post.

6 See PARAS 612-613 post.

7 The current provisions are contained in the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) which is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the provisions of the Mental Health Act 1983 Pt VII (as amended; prospectively amended) see PARA 671 *et seq* post.

8 See PARA 647 et seq post.

9 See PARA 749 et seq post.

10 See PARA 663 et seq post. The Mental Capacity Act 2005 ss 35-41 create a new scheme designed to provide for the input of an independent consultee where certain decisions need to be taken for particularly vulnerable people who lack capacity, the apparent intention being to address concerns as to deprivation of liberty under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 5 which were raised in *R v Bournewood Community and Mental Health NHS Trust, ex p L* [1999] 1 AC 458, [1998] 3 All ER 289, HL. See also *HL v United Kingdom (Application 45508/99)* (2004) 81 BMLR 131, (2004) Times, 19 October, ECtHR; and PARA 437 note 7 ante. Deprivation of liberty, in general, continues to be governed by the Mental Health Act 1983, subject to the exercise of the powers of the new Court of Protection under the Mental Capacity Act 2005.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(1) IN GENERAL/596. Mental disorder and mental incapacity.

596. Mental disorder and mental incapacity.

The definitions of mental disorder and its various forms in the Mental Health Act 1983¹ are provided for the purpose of the provisions of that Act relating to the care and treatment of patients² and to the management of their property and affairs³. The same terminology may also be employed for other purposes in other legislation⁴. However, the fact that a person suffers from mental disorder within the meaning of the Mental Health Act 1983, even if he is liable to be detained or subject to guardianship⁵ under that Act, does not of itself affect his capacity in civil or criminal law. Criminal⁶ and civil⁷ capacity are each judged by their own criteria, which differ according to the particular subject matter. The question of capacity is generally to be determined by the court or jury, having regard to any presumptions applicable⁸; and expert evidence does not relieve the court from the obligation of forming its own judgment⁹.

1 See the Mental Health Act 1983 s 1(2), (3); and PARAS 402-403 ante.

2 For the meaning of 'patient' for the purposes of the Mental Health Act 1983, other than in relation to the management of property and affairs, see PARA 435 ante.

3 For the meaning of 'patient' in relation to the management of property and affairs see PARA 681 post.

4 Eg in the Matrimonial Causes Act 1973 s 12(d) (amended by the Mental Health Act 1983 s 148(1), Sch 4 para 34) (grounds on which a marriage is voidable): see PARA 614 post.

5 As to guardianship see PARA 469 et seq ante.

6 As to the defence of insanity see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 31-33. As to the defence of diminished responsibility see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 96-97. As to findings that an accused is unfit to be tried see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1265. As to the disposal of mentally disordered offenders generally see PARAS 486-505, 535-541 ante; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARAS 1693-1700.

7 As to civil capacity see PARA 600 et seq post.

8 See PARA 597 post.

9 *Richmond v Richmond* (1914) 111 LT 273.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(1) IN GENERAL/597. Presumptions.

597. Presumptions.

Every person is presumed to have mental capacity until the contrary is proved, and this presumption applies in civil¹ as well as in criminal² cases. However, it is for the executors or other people seeking to set up a will to show that the testator had capacity at the time³.

Where a person has been proved or admitted to have been so mentally disordered as to lack the capacity to make a contract or disposition, such a condition is presumed to continue until it is proved to have ceased, and the burden of proving a recovery or a lucid interval lies on the person alleging it⁴. It has been said that the evidence to prove capacity must be as strong as that required to prove incapacity⁵.

If a long time has elapsed since the act which it is sought to attack on the ground of mental incapacity, the court will uphold the act in the absence of strong and cogent evidence to the contrary⁶. Similarly, in the absence of evidence to the contrary, it will be presumed that a person who prepared or attested the deed of a person alleged to be mentally disordered and who has since died would, if available as a witness, have given evidence to prove that the person alleged to be incapable did have capacity at the date of the execution of the deed⁷.

1 *White v Wilson* (1806) 13 Ves 87 at 88; *Steed v Calley* (1836) 1 Keen 620; *Creagh v Blood* (1845) 8 I Eq R 434; *Snook v Watts* (1848) 11 Beav 105. As to the presumption of unsoundness of mind for limitation purposes only see PARA 632 note 1 post.

2 1 Hale PC 33; *M'Naghten's Case* (1843) 10 Cl & Fin 200, HL; but see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 33. See also CIVIL PROCEDURE vol 11 (2009) PARA 1106.

3 See PARA 610 post.

4 *A-G v Parnter* (1792) 3 Bro CC 441; *Cartwright v Cartwright* (1793) 1 Phillim 90 at 100; *White v Wilson* (1806) 13 Ves 87; *White v Driver* (1809) 1 Phillim 84 at 88; *Groom v Thomas* (1829) 2 Hag Ecc 433; *Frank v Mainwaring* (1839) 2 Beav 115; *Snook v Watts* (1848) 11 Beav 105; *Waring v Waring* (1848) 6 Moo PCC 341; *Grimani v Draper* (1848) 6 Notes of Cases 418; *Johnson v Blane* (1848) 6 Notes of Cases 442; *Fowles v Davidson* (1848) 6 Notes of Cases 461 at 474; *Prinsep and East India Co v Dyce Sombre, Troup and Solaroli* (1856) 10 Moo PCC 232 at 239, 244; *Smith v Tebbitt* (1867) LR 1 P & D 398; *Hassard v Smith* (1872) IR 6 Eq 429. See also CIVIL PROCEDURE vol 11 (2009) PARAS 1069, 1106.

5 *A-G v Parnter* (1792) 3 Bro CC 441.

6 *Towart v Sellars* (1817) 5 Dow 231 at 236-237, HL; cf *Price v Berrington* (1851) 3 Mac & G 486 at 495.

7 *Towart v Sellars* (1817) 5 Dow 231, HL; cf *Harris v Ingledew* (1730) 3 P Wms 91 at 93; *Freshfield v Reed* (1842) 9 M & W 404. As to presumptions generally see CIVIL PROCEDURE vol 11 (2009) PARA 1096 et seq.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(1) IN GENERAL/598. Proof of capacity or incapacity.

598. Proof of capacity or incapacity.

In general, the question whether or not a person is so mentally disordered as to lack capacity for the act in question is one of fact for the court¹. The opinion of medical experts who have examined a person is admissible on the question whether or not the person is suffering from mental disorder², and will no doubt carry considerable weight. However, the court must decide the issue on the totality of both medical and lay evidence³. An order of the Court of Protection, reciting a finding that a person is incapable of managing his affairs, is admissible, although not conclusive, for other purposes⁴.

In civil proceedings, the rationality of an act and the manner of doing it have been regarded as strong evidence that the person doing it did not lack capacity, even if he was liable to be detained at the time⁵. The spontaneity of the act, its accord with natural affection and moral duty, and its conformity to past and subsequent declarations of intention have all been found relevant in this connection⁶. However, if the chief or only evidence of mental disorder is the nature of the act in question, the act must be intrinsically irrational if this is to carry any weight⁷.

The old cases also suggest that the general habits and course of life of the person concerned carry greater weight than particular acts done by him, even if very strange in themselves⁸. His conduct before and after the act is admissible⁹, but of less weight than evidence of his state of mind at the time¹⁰. His writings are admissible¹¹, and even his handwriting may be of some value¹². It would appear, however, that evidence of mental disorder in the family was not admitted in civil proceedings¹³.

1 *Lovatt v Tribe* (1862) 3 F & F 9; and see *Martin v Johnston* (1858) 1 F & F 122; *Boughton v Knight* (1873) LR 3 P & D 64 at 67; *Richmond v Richmond* (1914) 111 LT 273 at 274. Compulsory detention or guardianship under the Mental Health Act 1983 is not proof of a lack of capacity: see PARA 596 post.

2 *Martin v Johnston* (1858) 1 F & F 122; *Lovatt v Tribe* (1862) 3 F & F 9.

3 See eg *Hanbury v Hanbury* (1892) 8 TLR 559, CA.

4 *Harvey v R* [1901] AC 601 at 610-611, PC; *Re Marshall, Marshall v Whateley* [1920] 1 Ch 284 at 288 (in neither case had the person been found lunatic by inquisition). Reports by the Lord Chancellor's Visitors can only be disclosed in accordance with the Court of Protection Rules 2001, SI 2001/824 (as amended) (see PARAS 6776-678, 747 post) and are otherwise inadmissible: see *Roe v Nix* [1893] P 55; *Re B--* [1892] 3 Ch 194. As to the Court of Protection see PARA 676 post. As to the Lord Chancellors' Visitors see PARA 747 post.

5 *Snook v Watts* (1848) 11 Beav 105; *Banks v Goodfellow* (1870) LR 5 QB 549; *Cartwright v Cartwright* (1793) 1 Phillim 90 at 100; *Scruby and Finch v Fordham* (1822) 1 Add 74 at 90; *Re Watts's Goods* (1837) 1 Curt 594; *Montefiore v Montefiore* (1824) 2 Add 354 at 361-362; *Chambers and Yatman v Queen's Proctor* (1840) 2 Curt 415 at 451; *Nichols and Freeman v Binns* (1858) 1 Sw & Tr 239; *M'Adam v Walker* (1813) 1 Dow 148 at 178, HL; but see *Clarke v Leare and Scarwell* (1791) cited in 1 Phillim 119; *Evans v Knight and Moore* (1822) 1 Add 229 at 237-238; *Bannatyne and Bannatyne v Bannatyne* (1852) 2 Rob Eccl 472 at 501; *Creagh v Blood* (1845) 8 I Eq R 434; *A-G v Parnter* (1792) 3 Bro CC 441; *Waring v Waring* (1848) 6 Moo PCC 341; *Jenkins v Morris* (1880) 14 ChD 674, CA; *Smee v Smee* (1879) 5 PD 84; *Murfett v Smith* (1887) 12 PD 116.

6 *White v Driver* (1809) 1 Phillim 84 at 88; *Cartwright v Cartwright* (1793) 1 Phillim 90; *Evans v Knight and Moore* (1822) 1 Add 229; *M'Adam v Walker* (1813) 1 Dow 148, HL; *Anon* (1813) cited in 1 Dow 178-179; *Coghlan v Coghlan* (circa 1790) cited in 1 Phillim 120; *Clarke v Leare and Scarwell* (1791) cited in 1 Phillim 119; *Bannatyne and Bannatyne v Bannatyne* (1852) 2 Rob Eccl 472.

7 *Wrench v Murray* (1843) 3 Curt 623; *Boughton v Knight* (1873) LR 3 P & D 64; *Arbery v Ashe* (1828) 1 Hag Ecc 214.

8 *Snook v Watts* (1848) 11 Beav 105; *Boughton v Knight* (1873) LR 3 P & D 64 at 75.

9 *Beavan v M'Donnell* (1854) 10 Exch 184; cf *Lovatt v Tribe* (1862) 3 F & F 9.

10 *Ferguson v Borrett* (1859) 1 F & F 613; cf *Prinsep and East India Co v Dyce Sombre, Troup and Solaroli* (1856) 4 WR 714 at 718, PC.

11 *Bootle v Blundell* (1815) 19 Ves 494 at 506.

12 *Cartwright v Cartwright* (1793) 1 Phillim 90 at 100.

13 See *M'Adam v Walker* (1813) 1 Dow 148 at 167, 173, 177, HL; *Doe d Mather v Whitefoot* (1838) 8 C & P 270; cf *R v Oxford* (1840) 9 C & P 525 (criminal proceedings).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(1) IN GENERAL/599. Enduring powers of attorney.

599. Enduring powers of attorney.

Enduring powers of attorney under the Enduring Powers of Attorney Act 1985 are dealt with elsewhere in this work¹.

¹ As to the Enduring Powers of Attorney Act 1985 see PARA 673 post; and AGENCY vol 1 (2008) PARA 194 et seq. The Enduring Powers of Attorney Act 1985 is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 relating to lasting powers of attorney (which replace enduring powers of attorney) see PARA 647 et seq post; and AGENCY vol 1 (2008) PARA 194 et seq. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(2) CIVIL CAPACITY/(i) Contract/600. The development of the law.

(2) CIVIL CAPACITY

(i) Contract

600. The development of the law.

The original rule of law was that a contract with a person of unsound mind was void, because there could be no consensus ad idem. This was later qualified by a rule that a person could not plead his own unsoundness of mind to avoid a contract he had made. This in turn gave way to a further rule that such a plea was permissible if it could be shown that the other contracting party knew of the insanity¹.

¹ *Hart v O'Connor* [1985] AC 1000 at 1018-1019, [1985] 2 All ER 880 at 888, PC; *Irvani v Irvani* [2000] 1 Lloyd's Rep 412, CA.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(2) CIVIL CAPACITY/(i) Contract/601. Contractual capacity.

601. Contractual capacity.

The test of contractual capacity is whether or not the person was capable of understanding the nature of the contract he was entering into¹. This depends upon whether there was understanding of the particular transaction²; the degree of capacity required will therefore differ according to the nature of the transaction³. Furthermore, contracts made during a lucid interval by a person who is mentally incapable of contracting at other times are valid⁴, even if he is liable to be detained at the time⁵. Hence, mental incapacity in relation to contract may be permanent or temporary, general or in relation only to some transactions, or in relation to some transactions some of the time.

1 *Boughton v Knight* (1873) LR 3 P & D 64 at 72 (contrast capacity to enter various types of contract with capacity to make a will: see further PARA 610 post); *Jenkins v Morris* (1880) 14 ChD 674 at 681, CA. See also *Re Rhodes*, *Rhodes v Rhodes* (1890) 44 ChD 94 at 105, CA; and PARA 604 post.

2 *Boughton v Knight* (1873) LR 3 P & D 64 at 72; *Birkin v Wing* (1890) 63 LT 80 (sale of land, where vendor found capable of understanding transaction despite medical evidence).

3 *Manches v Trimborn* (1946) 174 LT 344 (an action on a cheque was unsuccessful, where the drawer was capable of understanding the act of drawing a cheque but not the transactions of which it formed part). See also *Re Beaney* [1978] 2 All ER 595, [1978] 1 WLR 770 (capacity to make a voluntary disposition differs according to scale of transaction); and PARA 1397 post. *Re Beaney* supra was applied in *Williams v Williams* [2003] EWHC 742 (Ch), [2003] All ER (D) 403 (Feb).

4 *Beverley's Case* (1603) 4 Co Rep 123b at 125a; *A-G v Parnter* (1792) 3 Bro CC 441; *Selby v Jackson* (1844) 6 Beav 192; and see *Birkin v Wing* (1890) 63 LT 80. Cf *Creagh v Blood* (1845) 8 I Eq R 434, where it was held that acts done when the defendant was wholly sane except on certain matters were not done during a lucid interval.

5 See *Selby v Jackson* (1844) 6 Beav 192 (deed of assignment for the benefit of creditors).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(2) CIVIL CAPACITY/(i) Contract/602. General rule in contract.

602. General rule in contract.

The effect of the common law rules described earlier¹ is that a contract made by a person who at the time lacked the capacity to make it is voidable but not void. The contract is binding upon him in every respect, whether it is executory or executed, unless he can show that the other contracting party knew of the incapacity at the time² or knew of such facts and circumstances that he must be taken to have known of the incapacity³. Unless there is such knowledge, the validity of a contract entered into by a person who is ostensibly sane is to be judged by the same standards as a contract entered into by a person of sound mind; it is not voidable by reason of unfairness unless the unfairness amounts to equitable fraud which would have enabled the complaining party to avoid the contract even if he had been sane⁴.

¹ See PARA 600 ante.

² *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599, CA (signing promissory note as surety); *York Glass Co Ltd v Jubb* (1925) 134 LT 36, CA (purchase of land). See also *Molton v Camroux* (1848) 2 Exch 487 (affd (1849) 4 Exch 17) (purchase of annuities from life assurance society in the ordinary course of business); *Baxter v Earl of Portsmouth* (1826) 5 B & C 170 (goods supplied); *Brown v Jodrell* (1827) 3 C & P 30; *Price v Berrington* (1851) 3 Mac & G 486 (conveyance); *Elliot v Ince* (1857) 7 De GM & G 475 at 487 per Lord Cranworth LC (sale and purchase); *Hassard v Smith* (1872) IR 6 Eq 429; *Beavan v M'Donnell* (1854) 9 Exch 309 (affd 10 Exch 184) (deposit on purchase of real estate); *Moss v Tribe* (1862) 3 F & F 297; *Barrow v Barrow* (1774) 2 Dick 504 (marriage settlement); *Drew v Nunn* (1879) 4 QBD 661, CA (goods supplied). There appears to have been some doubt at one time whether the proposition applied to mortgages by a person so mentally disordered as to lack capacity to enter into a mortgage (*Snook v Watts* (1848) 11 Beav 105; *Jacobs v Richards, Jacobs v Porter* (1854) 18 Beav 300 (on appeal 5 De G M & G 55)), but it is conceived that it would (*Campbell v Hooper* (1855) 3 Sm & G 153; and see *Kirkwall v Flight* (1842) 3 WR 529).

³ *York Glass Co Ltd v Jubb* (1925) 134 LT 36 at 41, CA, per Warrington LJ: 'If circumstances are proved which are such that any reasonable man would have inferred from those circumstances that the man was insane, then the man who contracts with him . . . would be taken to know that the man was of unsound mind'.

⁴ *Hart v O'Connor* [1985] AC 1000, [1985] 2 All ER 880, PC (sale of land); *Irvani v Irvani* [2000] 1 Lloyd's Rep 412, CA.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(2) CIVIL CAPACITY/(i) Contract/603. Special cases.

603. Special cases.

Matters of record are not, as a rule, voidable¹, but this was frequently disregarded both at common law² and in equity, where the court in the exercise of its ordinary jurisdiction would set aside any such transaction which it deemed to be inequitable³.

¹ *Beverley's Case* (1603) 4 Co Rep 123b; 3 Bac Abr, Fines and Recoveries (C). This was so even in the case of a person found to be of unsound mind under the procedure of inquisition prior to the Mental Health Act 1959. Examples are a fine or recovery: Co Litt 247a; *Lewing's Case* (1584) cited in 10 Co Rep 42b; *Mansfield's Case* (1614) 12 Co Rep 123 at 124; *Murley v Sherren* (1838) 8 Ad & El 754; *Hume v Burton* (1785) 1 Ridg Parl Rep 16, 204, 276; *Needler v Bishop of Winchester* (1614) Hob 220.

² *Wentworth v Cholmley* (1744) cited in 3 Atk at 313; *Beverley's Case* (1603) 4 Co Rep 123b; *Chamberlaine v Thorpe* (1590) Cro Eliz 187; *Hume v Burton* (1785) 1 Ridg Parl Rep 16, 276; *Thompson v Leach* (1697) 3 Mod Rep 301; *Stokes v Oliver* (1696) 5 Mod Rep 209; *Robert's Case* (1746) 3 Atk 308 at 312; *Walcott, Vouchee* (1826) 3 Bing 423.

Addison v Dawson (1711) 2 Vern 678; cf *Howard v Earl of Digby* (1834) 2 Cl & Fin 634 at 661, HL; *Ferres v Ferres* (1708) 2 Eq Cas Abr 695; *Coleby v Smith* (1683) 1 Vern 205; *Cartright v Pultney* (1742) 2 Atk 380; *Baker v Pritchard (alias Hosier)* (1742) 2 Atk 387; *Clerk v Clerk* (1700) 2 Vern 412; *Frank v Mainwaring* (1839) 2 Beav 115.

The common law doctrine of market overt has been abolished (see MARKETS, FAIRS AND STREET TRADING vol 29(2) (Reissue) PARA 1026), but, formerly, a mentally incapacitated person could not avoid a sale of his property in market overt by a stranger, although if one of the parties to the sale was a mentally incapacitated person the position was the same as in any other contract involving such a person (see 2 Co Inst 713).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(2) CIVIL CAPACITY/(i) Contract/604. Contracts for necessities.

604. Contracts for necessities.

The Sale of Goods Act 1979 provides that if necessities are sold and delivered to a person who by reason of mental incapacity is incompetent to contract, he must pay a reasonable price for them¹. Necessaries are goods suitable to the person's condition in life and to his actual requirements at the time². Whenever necessities are supplied to such a person, the common law implies an obligation upon him to pay for them, provided that they are supplied in circumstances which would justify the court in implying an obligation to repay³; and this would apply to the supply of necessary services and to the supply of money to buy such things⁴.

1 Sale of Goods Act 1979 s 3(2). This rule presumably applies irrespective of whether the supplier knew of the incapacity. See SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 37. As from a day to be appointed, s 3(2) is amended to exclude the reference to mental incapacity (and leave only a reference to drunkenness): s 3(2) (prospectively amended by the Mental Capacity Act 2005 s 67(1), Sch 6 para 24). At the date at which this volume states the law no such day had been appointed. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 Sale of Goods Act 1979 s 3(3).

3 *Re Rhodes, Rhodes v Rhodes* (1890) 44 ChD 94, CA.

4 *Re Rhodes, Rhodes v Rhodes* (1890) 44 ChD 94, CA (necessaries might include costs of private asylum, but in this case the patient's relatives had not intended to be repaid); *Re Beavan, Davies, Banks & Co v Beavan* [1912] 1 Ch 196 (money advanced to pay outgoings; necessities may include interest on mortgages, repairs, insurance and rent audit expenses).

UPDATE

604 Contracts for necessities

NOTE 1--Day now appointed: SI 2007/1897.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(2) CIVIL CAPACITY/(i) Contract/605. Effect of jurisdiction of Court of Protection.

605. Effect of jurisdiction of Court of Protection.

Where a person's property and affairs have become subject to the jurisdiction of the Court of Protection¹, he cannot deal with them in any way which is inconsistent with the court's powers; hence any transaction entered into during this time is void, irrespective of whether or not he actually had capacity to enter into it², and, it would appear, irrespective of whether or not the other contracting party knew that his affairs were under the court's control. The court may, however, elect that a contract made by a mentally incapacitated person before his affairs became subject to its jurisdiction be adopted and thus validated *ab initio*³.

1 See PARA 671 et seq post.

2 *Re Walker* [1905] 1 Ch 160, CA (deed executed by person found lunatic by inquisition, even during a lucid interval, is null and void); *Re Marshall, Marshall v Whateley* [1920] 1 Ch 284 (equitable charge executed after appointment of receiver null and void). Cf a will: see PARA 610 post.

3 *Baldwyn v Smith* [1900] 1 Ch 588. As to the position of creditors once a person's property and affairs have become subject to the court's jurisdiction see PARAS 682, 686, 699 post.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(2) CIVIL CAPACITY/(i) Contract/606. Agency.

606. Agency.

Mental disorder such as to render a person incapable of acting on his own behalf incapacitates him from appointing an agent¹; and a power of attorney executed by a person who is incapable of understanding what is to be effected by it is invalid². Further, if mental incapacity supervenes during the currency of the appointment of an agent, it terminates the agency³ unless there is an agency by estoppel or holding out on which a third person dealing with the agent without knowledge of the supervening mental disorder may rely⁴. A representation by an agent that he is authorised to act as agent may render him liable for breach of warranty of authority if the principal has at the time become mentally incapacitated, even if the agent was unaware of this⁵. However, statute now provides for the creation of enduring powers of attorney which will survive the subsequent mental incapacity of the donor⁶.

Acts done on behalf of a person suffering from such mental disorder as incapacitates him from contracting, without the authority of a receiver able to act for him, are done at the risk of liability if he does not ratify them on recovering his mental health⁷.

1 *Elliot v Ince* (1857) 7 De G M & G 475 (power of attorney granted by lunatic so found by inquisition at the date of execution was invalid; it was indicated that the deed might have been valid if executed during a lucid interval; but see PARA 605 note 2 ante); and see AGENCY vol 1 (2008) PARA 6.

2 *Elliot v Ince* (1857) 7 De G M & G 475 (see note 1 supra); *Daily Telegraph Newspaper Co Ltd v McLaughlin* [1904] AC 776, PC (power of attorney granted by person incapable through mental disorder of understanding it, although not a lunatic so found, was invalid, as was the deed executed by the attorney acting under it). However, as to the power to create enduring powers of attorney see the text and note 6 infra.

3 *Drew v Nunn* (1879) 4 QBD 661 at 666, CA, per Brett LJ; and see *Yonge v Toynbee* [1910] 1 KB 215, CA. This is subject to statutory exception where a power of attorney has been given for valuable consideration and is expressed to be irrevocable: see AGENCY vol 1 (2008) PARAS 171, 215. The mental disorder of the claimant is not a defence to a claim, but denies the authority of solicitors to proceed: see *Richmond v Branson & Son* [1914] 1 Ch 968; and PARA 633 post.

4 *Drew v Nunn* (1879) 4 QBD 661 at 667-669, CA. As to agency by estoppel see generally AGENCY vol 1 (2008) PARA 25.

5 *Yonge v Toynbee* [1910] 1 KB 215, CA. As to liability for breach of warranty of authority see AGENCY vol 1 (2008) PARAS 160-161. In regard to solicitors' liability and their costs see *Re George Armstrong & Sons* [1896] 1 Ch 536; *Re E G* [1914] 1 Ch 927, CA (receiver of the income not liable personally to solicitor for costs payable out of patient's estate); and LEGAL PROFESSIONS vol 66 (2009) PARA 884.

6 See the Enduring Powers of Attorney Act 1985; para 673 post; and AGENCY vol 1 (2008) PARA 194 et seq. As from a day or days to be appointed the Enduring Powers of Attorney Act 1985 is repealed by the Mental Capacity Act 2005 s 66(1)(b), Sch 7. At the date at which this volume states the law no such day had been appointed. As to lasting powers of attorney under the Mental Capacity Act 2005 see PARA 647 post.

7 See *Healing v Healing* (1902) 51 WR 221 (sale of business on wife's instructions and proceeds applied in maintenance of children not of tender years).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(2) CIVIL CAPACITY/(i) Contract/607. Partnership.

607. Partnership.

A partner's permanent unsoundness of mind has long been a ground on which the High Court¹ might dissolve a partnership, although such unsoundness of mind did not of itself bring the partnership to an end². Before 1959, statutory powers to this effect existed in both the High Court and the Judge in Lunacy. The power of the High Court was removed in 1959³, while the judge having jurisdiction under the Mental Health Act 1983⁴ retains the power to make an order or give directions or authority for the dissolution of any partnership of which a patient⁵ is a member⁶. However, it seems that the jurisdiction of the High Court to decree a dissolution of partnership whenever circumstances have arisen which, in the court's opinion, render it just and equitable to do so⁷ enables the court to dissolve a partnership where a partner suffers from such mental disorder as renders dissolution just. Relief will be given for the preservation of the partnership interest of the mentally disordered partner, if that is needed, pending dissolution⁸; and an injunction restraining a mentally disordered partner from interfering in the conduct of the partnership affairs may be granted in a proper case⁹.

1 As to the High Court see COURTS vol 10 (Reissue) PARA 351 et seq.

2 See PARTNERSHIP vol 79 (2008) PARA 184 et seq. See particularly *Sayer v Bennet* (1784) 1 Cox Eq Cas 107, cited in *Jones v Lloyd* (1874) LR 18 Eq 265 at 273-274.

3 See on the repeal of the Partnership Act 1890 s 35(a) by the Mental Health Act 1959 s 149(2), Sch 8 Pt I (repealed).

4 As to the judge see PARA 674 post.

5 For the meaning of 'patient' see PARA 681 post.

6 See the Mental Health Act 1983 s 96(1)(g); and PARA 683 post. The Mental Health Act 1983 Pt VII (ss 93-113) (as amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARAS 641 et seq, 749 et seq post. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

In the exercise of this jurisdiction under the Mental Health Act 1983 s 96(1)(g), the requirements of the patient are the first consideration: see s 95(2); and PARA 682 post.

7 See the Partnership Act 1890 s 35(f); and PARTNERSHIP vol 79 (2008) PARA 190. Alternatively, dissolution may be decreed on the ground of permanent incapacity: see s 35(b); and PARTNERSHIP vol 79 (2008) PARA 186.

8 See *Jones v Lloyd* (1874) LR 18 Eq 265.

9 See *J v S* [1894] 3 Ch 72, where an action for dissolution was pending but the court had not been satisfied that the defendant was permanently of unsound mind and had adjourned the case.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(2) CIVIL CAPACITY/(ii) Dispositions Inter Vivos/608. Capacity to execute deeds and dispositions inter vivos.

(ii) Dispositions Inter Vivos

608. Capacity to execute deeds and dispositions inter vivos.

The test of capacity to execute a deed is whether the person is capable of understanding what he does by executing the deed in question when its nature and effect are explained to him¹. A valid deed might be executed during a lucid interval² or before mental incapacity supervened³. However, the degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect; if the subject matter and value of a gift are trivial in relation to the donor's other assets a low degree of understanding will suffice; but if its effect is to dispose of the donor's only asset of value and thus for practical purposes to pre-empt the devolution of his estate, then the degree of understanding is as high as that required for a will⁴.

1 *Ball v Mannin* (1829) 3 Bli NS 1 at 22, HL; *Leach v Thompson* (1698) Show Parl Cas 150, HL (affg *Thompson v Leach* (1690) 3 Mod Rep 301). See also *Beverley's Case* (1603) 4 Co Rep 123b, as to which see *Re Walker* [1905] 1 Ch 160 at 179, CA (lunatic so found); *Yates v Boen* (1738) 2 Stra 1104 (evidence of insanity admitted on plea of non est factum); *Faulder v Silk* (1811) 3 Camp 126 (evidence similarly admitted); *Daily Telegraph Newspaper Co Ltd v McLaughlin* [1904] AC 776, PC. See further *Price v Berrington* (1849) 7 Hare 394 at 402 (on appeal (1851) 3 Mac & G 486) (legal estate not passed by conveyance of lunatic); *Howard v Earl of Digby* (1834) 2 Cl & Fin 634 at 663, HL (obligation by bond would not bind lunatic).

2 *Towart v Sellars* (1817) 5 Dow 231, HL; *Beverley's Case* (1603) 4 Co Rep 123b.

3 *Affleck v Affleck* (1857) 3 Sm & G 394.

4 *Re Beaney* [1978] 2 All ER 595, [1978] 1 WLR 770. As to capacity to execute a will see PARA 610 post.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(2) CIVIL CAPACITY/(ii) Dispositions Inter Vivos/609. Effect of deed or disposition by incapacitated person.

609. Effect of deed or disposition by incapacitated person.

A deed executed by a mentally incapacitated person was void in law¹. However, in deciding whether to set aside such a deed, courts of equity took into consideration the circumstances of the case: rescission would be granted unless it was inequitable to do so². Thus, although a voluntary disposition might be set aside even against subsequent purchasers for value without notice³, rescission might be refused where there had been delay⁴, or where the transaction was prudent and rescission would be inequitable⁵. These cases were all decided before the modern law as to the general effect of contracts made by mentally incapacitated persons became clear⁶. There may be a distinction between dispositions made by deed but for valuable consideration and voluntary dispositions however made⁷.

A deed of disposition executed by a person whose property and affairs are under the jurisdiction of the Court of Protection is void⁸.

1 *Ball v Mannin* (1829) 3 Bli NS 1 at 22, HL; and see the cases cited in PARA 608 note 1 ante.

2 See generally *Niell v Morley* (1804) 9 Ves 478; *Campbell v Hooper* (1855) 3 Sm & G 153 at 158; *Price v Berrington* (1849) 7 Hare 394 at 402 (on appeal (1851) 3 Mac & G 486). As to rescission generally see CONTRACT vol 9(1) (Reissue) PARA 986 et seq.

3 *Clerk v Clerk* (1700) 2 Vern 412 (settlement); *Elliot v Ince* (1857) 7 De G M & G 475 (disentailing deed); *Sentance v Poole* (1827) 3 C & P 1 (promissory note); *Manning v Gill* (1872) LR 13 Eq 485 (voluntary deed). See also GIFTS vol 52 (2009) PARA 212.

4 *Towart v Sellars* (1817) 5 Dow 231 at 236-237, HL, per Lord Eldon (20 or 30 years after disposition, parties best acquainted with circumstances dead).

5 *Selby v Jackson* (1844) 6 Beav 192; *Niell v Morley* (1804) 9 Ves 478. See also *Campbell v Hooper* (1855) 3 Sm & G 153 at 158, cited by Sargant LJ in *York Glass Co Ltd v Jubb* (1925) 134 LT 36 at 44, CA, from which it seems that a deed would not be set aside unless there would be inequity in allowing it to stand.

6 See PARA 602 ante.

7 In *Re Beaney* [1978] 2 All ER 595, [1978] 1 WLR 770, the judge declined to express a view on this matter.

8 *Re Walker* [1905] 1 Ch 160, CA; *Re Marshall, Marshall v Whateley* [1920] 1 Ch 284; and see PARA 1394 ante. As to conveyances etc on behalf of mentally disordered persons see PARA 687 post. As to the Court of Protection see PARA 676 post.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(2) CIVIL CAPACITY/(iii) Wills and Intestacy/610. Wills and intestacy.

(iii) Wills and Intestacy

610. Wills and intestacy.

In order that a testator may make a valid will it is essential that he should understand the nature of the act and its effect, be able to appreciate the claims to which he ought to give effect and understand the extent of the property of which he is disposing¹. Thus the intellectual understanding required for testamentary capacity is somewhat different from that required for ordinary contracts, since it includes, for example, appreciation of the claims of possible beneficiaries². The burden of establishing testamentary capacity is on the person propounding the will³.

If a person has the capacity to make a will, he may do so even though his affairs are under the control of the Court of Protection and a receiver has been appointed⁴. However, if an adult person is incapable of managing his property and affairs and the judge has reason to believe that he is incapable of making a valid will for himself⁵, statutory provision exists for the Court of Protection to make one on his behalf⁶.

Generally, the rules as to distribution on intestacy are not affected by the mental incapacity of the intestate. However, if a lunatic or defective⁷, living and of full age on 1 January 1926, was entitled before then to a beneficial interest in freehold property, and if he dies without having recovered testamentary capacity, the beneficial interest devolves on intestacy in accordance with the law in force before 1926⁸.

If property of a mentally disordered person has been disposed of under the Mental Health Act 1983, and another person would have taken an interest in that property under his will or on his intestacy but for the disposal, that person takes the same interest, if and so far as circumstances allow, in any property belonging to the deceased's estate which represents the property disposed of⁹.

1 *Banks v Goodfellow* (1870) LR 5 QB 549; *Battan Singh v Amirchand* [1948] AC 161, [1948] 1 All ER 152, PC; *Minns v Foster* [2002] All ER (D) 225 (Dec); *Hoff v Atherton* [2004] EWCA Civ 1554, [2004] All ER (D) 314 (Nov). See further EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 309 et seq.

2 Distinctions are more fully indicated in *Birkin v Wing* (1890) 63 LT 80 at 82. See also *Re Beaney* [1978] 2 All ER 595, [1978] 1 WLR 770; and PARA 608 ante.

3 *Cleare and Forster v Cleare* (1869) LR 1 P & D 655. See further EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 314.

4 *Re Walker* [1905] 1 Ch 160 at 172, CA. As to the Court of Protection see PARA 676 post.

5 Mental Health Act 1983 s 96(4). The Mental Health Act 1983 Pt VII (ss 93-113) (as amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARAS 641 et seq, 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARAS 406, 595 ante.

6 See the Mental Health Act 1983 ss 96(1)(e), 97; and PARAS 695-696 post. See note 5 supra.

7 As to the meaning of these terms see PARA 401 ante.

8 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 633.

- 9 See the Mental Health Act 1983 s 101; and PARA 746 post. See note 5 *supra*.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(2) CIVIL CAPACITY/(iv) Tort/611. Tort.

(iv) Tort

611. Tort.

If a person who is mentally disordered but who knows the nature and quality of his act commits a tort, it is no defence that he does not know that what he is doing is wrong¹. However, it remains a question whether the test for liability in negligence is so purely objective that a defendant's lack of understanding or control cannot be a defence².

¹ *Morriss v Marsden* [1952] 1 All ER 925 (an action for assault and battery; however, it was said at 927 per Stable J that 'if a person in a state of complete automatism inflicted a grievous injury, that would not be actionable'). This seems to have been the old common law view: see *Weaver v Ward* (1616) Hob 134; Bac Abr, Trespass (G 1); and see *Haycraft v Creasy* (1801) 2 East 92 at 104 per Lord Kenyon CJ; *Mordaunt v Mordaunt, Cole and Johnson* (1870) LR 2 P & D 109 at 142 per Kelly CB; *Donaghy v Brennan* (1901) 19 NZLR 289. See also *Hanbury v Hanbury* (1892) 8 TLR 559 at 560, CA, per Lord Esher MR; *Emmens v Pottle* (1885) 16 QBD 354 at 356, CA.

² See NEGLIGENCE vol 78 (2010), especially PARAS 1, 21.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(2) CIVIL CAPACITY/(v) Medical Treatment/612. Capacity to consent to medical treatment.

(v) Medical Treatment

612. Capacity to consent to medical treatment.

There is a considerable body of case law as to when an adult patient¹ is incapable² of consenting to being given medical treatment. For consent to medical treatment to be effective as a defence to a claim for battery, it is enough that the patient's consent is 'real' in the sense that he understands in broad terms what is involved³. However, a doctor may be liable in negligence⁴ if he fails to give the patient proper advice and information about the treatment and to warn him of any significant risks⁵. This duty to give advice and information will normally be discharged if he acts in accordance with a practice accepted as proper by a responsible body of medical opinion skilled and experienced in the specialty concerned⁶, unless disclosure of a particular risk is so obviously necessary to an informed choice on the part of the patient that no reasonably prudent doctor would fail to make it⁷. It would appear, therefore, that the degree of capacity required to consent to medical treatment is either the capacity to understand in broad terms the nature and effect of the treatment proposed or the capacity to understand the explanation which in all the circumstances of the case a reasonably prudent doctor would make⁸. However, the more serious the decision, the greater the capacity required⁹. A statutory test of capacity is laid down for those particular treatments which are regulated under the Mental Health Act 1983¹⁰.

1 As to minor patients see PARAS 437 ante, 613 post.

2 Eg because the patient is unconscious as a result of an accident or otherwise and the treatment cannot be safely delayed until consciousness is recovered, or because the patient cannot by reason of mental disability understand the nature or purpose of the treatment: *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 55, sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545 at 551, HL, per Lord Brandon of Oakbrook. In an emergency where a patient declines treatment necessary to save his life or spare irreparable damage being done to his health, doctors should consider whether he has a capacity commensurate with the gravity of the decision. In some cases doctors should consider whether the refusal is vitiated because it arises from others', not the patient's, will: *Re T (Adult: Refusal of Medical Treatment)* [1992] 4 All ER 649, [1992] 2 FCR 861, CA. A patient who is otherwise competent may be rendered temporarily incapable of consenting to or refusing medical treatment by factors such as panic induced by fear: *Re MB* [1997] 2 FCR 541, [1997] 8 Med LR 217, (1997) 38 BMLR 175, CA. For suggested rules in regard to acting without consent when consent is not available and life is threatened see *Re T (Adult: Refusal of Treatment)* supra. See also *Re C (Adult: Refusal of Treatment)* [1994] 1 All ER 819, [1994] 2 FCR 151; *B v Croydon Health Authority* [1995] 1 All ER 683, [1995] 1 FCR 662, 22 BMLR 13; *Re MB* supra; *Re JT (Adult: Refusal of Medical Treatment)* [1998] 2 FCR 662, [1998] 1 FLR 48. As to capacity to consent to medical treatment generally see also *HE v A NHS Trust* [2003] EWHC 1017 (Fam), [2003] 2 FLR 408; and note 8 infra.

3 *Chatterton v Gerson* [1981] QB 432, [1981] 1 All ER 257.

4 This test to be applied is the same as that applicable in claims for negligence: *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 52, sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545 at 549, HL, per Lord Bridge of Harwich, at 68 and 560 per Lord Brandon of Oakbrook, and at 78 and 567 per Lord Goff of Chieveley.

5 *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871, [1985] 1 All ER 643, HL.

6 See *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, [1957] 1 WLR 582 (not at that time negligent to give mental patient electro-convulsive therapy without muscle relaxant). See also *Bolitho v City and Hackney Health Authority* [1998] AC 232, [1997] 4 All ER 771, where it was held that a doctor could be liable for negligence in respect of diagnosis and treatment despite a body of professional opinion sanctioning

his conduct where it had not been demonstrated to the judge's satisfaction that the body of opinion relied on was reasonable or responsible. See also *Pearce v Bristol Healthcare NHS* (1999) 48 BMLR 118, CA.

7 *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871 at 900, [1985] 1 All ER 643 at 663, HL.

8 The precise degree of capacity required is not discussed in the leading case on the effect of incapacity: see *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545, HL; and PARAS 553 ante, 613 post.

As to whether the consent of the court is required where the effect but not the objective of an operation is the sterilisation of a mentally handicapped minor see *Re E (A Minor) (Medical Treatment)* [1991] FCR 771, 7 BMLR 177; *Re C (Mental Patient: Medical Treatment)* [1994] 1 All ER 819, 15 BMLR 77. See also *Re JT (Adult: Refusal of Medical Treatment)* [1998] 2 FCR 662, [1998] 1 FLR 48 (patient with mental disability declined treatment for kidney failure and evidence showed she had the capacity to do so); *NHS Trust v T (Adult Patient: Refusal of Medical Treatment)* [2004] EWHC 1279 (Fam), [2005] 1 All ER 387, [2004] 3 FCR 297 (patient with borderline personality disorder had previously signed directive refusing treatment). A competent adult's anticipatory refusal of consent (ie an advance statement or 'living will') remains binding and effective notwithstanding that the patient has subsequently become incompetent: see *HE v A NHS Trust* [2003] EWHC 1017 (Fam), [2003] 2 FLR 408 (refusal of blood transfusion). See also the Mental Capacity Act 2005 ss 24-26 (which seek to codify and clarify these common law rules); and PARAS 652-655 post. At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force: see PARA 595 ante.

9 *Re T (Adult: Refusal of Medical Treatment)* [1992] 4 All ER 649, CA. There is a prima facie presumption of capacity, and detention under the Mental Health Act 1983 does not of itself rebut this presumption. Irrationality, panic or disorder of mind may have a role as a symptom or evidence of incapacity or of fluctuating or reduced capacity: see *Re C (Adult: Refusal of Treatment)* [1994] 1 All ER 819, [1994] 2 FCR 151 (test whether capacity so reduced that the patient does not understand the nature, purpose and effects of the proffered medical treatment); *B v Croydon Health Authority* [1995] 1 All ER 683, [1995] 1 FCR 662, 22 BMLR 13 (the patient did not lack consent but could be tube-fed without consent under the Mental Health Act 1983 s 63 (see PARA 553 ante)); *Re MB* [1997] 2 FCR 541, [1997] 8 Med LR 217, 38 BMLR 175, CA (patient needing emergency Caesarean held to be incapable of giving consent as withholding consent irrational in the circumstances and induced by panic); *Re JT (Adult: Refusal of Medical Treatment)* [1998] 2 FCR 662, [1998] 1 FLR 48 (woman competent to refuse treatment on basis of test in *Re C (Adult: Refusal of Treatment)* supra); *R v Bournemouth Community and Mental Health NHS Trust, ex p L* [1999] 1 AC 458, [1998] 3 All ER 289, HL (importance of assessing capacity). As to anticipatory refusals see the Mental Capacity Act 2005; and note 8 supra. Doubts over capacity must be resolved as soon as clinically possible; in the mean time the patient can be treated in accordance with clinical judgment as to best interests (see PARA 613 post) and if disagreement persists the hospital should make the relevant application to the High Court or seek the advice of the Official Solicitor (see PARA 748 post): *NHS Trust v T (Adult Patient: Refusal of Medical Treatment)* [2004] EWHC 1279 (Fam), [2005] 1 All ER 387, [2004] 3 FCR 297

10 See PARAS 554-555 ante.

UPDATE

612 Capacity to consent to medical treatment

NOTES--As to court intervention concerning medical treatment to, or the welfare of, an adult who lacks capacity to make decisions for himself, see *Practice Note (Official Solicitor, CAFCASS and the National Assembly for Wales: Urgent and Out of Hours Cases in the Family Division of the High Court)* [2006] 2 FLR 354.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(2) CIVIL CAPACITY/(v) Medical Treatment/613. Effect of lack of capacity to consent.

613. Effect of lack of capacity to consent.

Although a parent may consent to medical treatment on behalf of a child who is incapable of giving a valid consent¹, no one has power to consent on behalf of a mentally incapacitated adult, nor is there any jurisdiction in the court either to give such a consent or to appoint some other person to give it². However, treatment may be given where it is necessary in the best interests of the patient and the court has power to grant a declaration that a particular treatment proposed will not be unlawful³. Such a declaration is not a necessary precondition even for controversial treatments such as sterilisation but it is highly desirable⁴. Patients who are liable to be detained under certain provisions of the Mental Health Act 1983⁵ may be given treatment for their mental disorder without their consent, save for particular treatments which require either consent or a second opinion and others which require both consent and a second opinion⁶. A bodily sample which the court has directed to be taken for the purpose of establishing paternity⁷ may be taken from a person suffering from mental disorder who is incapable of understanding the nature and purpose of scientific tests only if the person having his care and control consents to this and the medical practitioner in whose care he is certifies that taking the sample will not be prejudicial to his proper care and treatment⁸.

1 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, [1985] 3 All ER 402, HL; *Re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11, [1991] 4 All ER 177, CA. See also *Re J (A Minor) (Inherent Jurisdiction: Consent to Treatment)* (1992) Times, 15 July, CA; and PARA 437 note 10 ante. See *Simms v Simms, A v A* [2002] EWHC 2734 (Fam), [2003] Fam 83, [2003] 1 All ER 669 (evidence from parents that their children would probably have chosen to try experimental treatment for the alleviation of suffering if they had had mental capacity to do so).

2 *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545, HL. See also *Re T (Adult: Refusal of Medical Treatment)* [1992] 4 All ER 649, CA; and see further PARA 612 ante. Applying *Re F (Mental Patient: Sterilisation)* supra, although the court's declaratory jurisdiction is usually exercised to declare that a proposed course of medical treatment for a mental patient is lawful, the jurisdiction can be exercised in other situations involving mental patients if there is evidence that the patient has no legal capacity and if the effect of the declaration will be to support, rather than interfere with, a legal right: *Cambridgeshire County Council v R* [1994] 2 FCR 973, [1995] 1 FLR 50. The court has power to grant a declaration that, notwithstanding the patient's inability to consent, it is lawful not to impose treatment where it is not reasonably practical to do so: *Re D (Medical Treatment)* [1998] 2 FCR 178, (1997) 41 BMLR 81.

A competent adult's anticipatory refusal of consent (ie an advance statement or 'living will') remains binding and effective notwithstanding that the patient has subsequently become incompetent: see *HE v A NHS Trust* [2003] EWHC 1017 (Fam), [2003] 2 FLR 408; and PARA 612 ante. See also the Mental Capacity Act 2005 ss 24-26 (which seek to codify and clarify these common law rules); and PARAS 652-655 post. At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force: see PARA 595 ante.

3 *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545, HL. See also *Cambridgeshire County Council v R* [1994] 2 FCR 973, [1995] 1 FLR 50; *Re D (Medical Treatment)* [1998] 2 FCR 178, (1997) 41 BMLR 81; and see note 2 supra. See also *Re A (Medical Treatment: Male Sterilisation)* [2000] 1 FCR 193, CA; *Re Z (Medical Treatment: Hysterectomy)* [2000] 1 FCR 274; *Re S (Adult Patient: Sterilisation)* [2001] Fam 15, CA. See *Re S (Medical Treatment: Adult Sterilisation)* [1999] 1 FCR 277, [1998] 1 FLR 944; and note 4 infra.

The jurisdiction deriving from *Re F (Mental Patient: Sterilisation)* supra uses the doctrine of necessity to permit incapable patients to be operated on or treated; this is a new jurisdiction and is not restricted to medical interests but has now expanded so that the courts have a near unfettered authority to make decisions for incapacitated adults on the ground of best interests: see *Re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1, [1995] 3 All ER 290, CA; *Re MB* [1997] 2 FCR 541, [1997] 8 Med LR 217, 38 BMLR 175, CA; *Re Y (Mental Incapacity: Bone Marrow Transplant)* [1997] 2 FCR 172, [1996] 2 FLR 787, (1996) 35 BMLR 111; *Re A (Medical*

Treatment: Male Sterilisation) supra. As to Munby J's guidance on the nature of the High Court's declaratory jurisdiction over incapacitated adults and children see *A v A Health Authority, Re J (a child), R (on the application of S) v Secretary of State for the Home Department* [2002] EWHC 18 (Fam/Admin), [2002] Fam 213. See also *E (by her Litigation Friend the Official Solicitor) v Channel Four, News International Limited and St Helens Borough Council* [2005] EWHC 1144 (Fam). As to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) arts 3, 8 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq) see *R (on the application of PS) v Responsible Medical Officer* [2003] EWHC 2335 (Admin), [2003] All ER (D) 178 (Oct); *Pretty v United Kingdom (Application 2346/02)* [2002] 2 FCR 97, [2002] 2 FLR 45, ECtHR. As to the exercise of the High Court's jurisdiction by the new Court of Protection under the Mental Capacity Act 2005 see PARA 750 et seq post. As to the principles relating to capacity and best interests under the Mental Capacity Act 2005 see PARAS 641-642 post; and see also PARA 595 ante.

4 *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545, HL. See also *Re A (Medical Treatment: Male Sterilisation)* [2000] 1 FCR 193, CA; *Re Z (Medical Treatment: Hysterectomy)* [2000] 1 FCR 274; *Re S (Adult Patient: Sterilisation)* [2001] Fam 15, [2000] 2 FCR 452, CA.

Before declaring that the sterilisation of a woman incapable of giving her own consent is lawful, a High Court judge must be satisfied that the procedure is in her best interests; there must be an identifiable, rather than speculative, risk of pregnancy to outweigh the risk of fatality: *Re S (Medical Treatment: Adult Sterilisation)* [1999] 1 FCR 277, [1998] 1 FLR 944. See also *Norfolk and Norwich Healthcare (NHS) Trust v W* [1997] 1 FCR 269, [1996] 2 FLR 613, (1996) 34 BMLR 15 (in certain circumstances, the court has power at common law to authorise the use of reasonable force in the course of treatment); *Re Y (Mental Incapacity: Bone Marrow Transplant)* [1997] 2 FCR 172, [1996] 2 FLR 787, (1996) 35 BMLR 111 (bone marrow transplant from mentally incapacitated donor to carer ordered; in donor's best interests that carer's life be preserved); *Re X (Adult Patient: Sterilisation)* [1999] 3 FCR 426, [1998] 2 FLR 1124 (permanent sterilisation, which would protect a severely mentally retarded woman from risk of physical or psychological harm if she became pregnant while indirectly allowing her more freedom, was considered to be in her best interests); *Re S (Adult Patient: Sterilisation)* [2001] Fam 15, [2000] 2 FCR 452, CA (hysterectomy to eliminate heavy menstrual bleeding was in patient's best interests given disadvantages of alternative less intrusive treatment; a patient lacking the mental capacity to consent to surgery has the right not to have it imposed on her unless it is demonstrably in her best interests); *Re Z (Medical Treatment: Hysterectomy)* supra (hysterectomy, which would eliminate patient's painful menstrual periods and protect her from catastrophic consequences of pregnancy, was in patient's best interests); cf *Re A (Medical Treatment: Male Sterilisation)* supra (sterilisation not in best interests of mentally incapacitated man when birth of child unlikely to impinge on him to significant degree). See also *R v Collins, ex p Brady* (2000) 58 BMLR 173 (force feeding patient on hunger strike). The best interests of the patient are not confined to medical interests, there are also emotional and welfare issues: see *Re Y (Mental Incapacity: Bone Marrow Transplant)* supra; *Re A (Medical Treatment: Male Sterilisation)* supra.

As to the relevant procedure see *Practice Note, J v C* [1990] 3 All ER 735, [1990] 1 WLR 1248. However, a declaration is not required for a sterilisation which is the incidental result of a hysterectomy performed on such a woman for therapeutic reasons, provided that two medical practitioners are satisfied that the operation is necessary for therapeutic reasons, that it is in the best interests of the patient, and that there is no practicable less obtrusive means of treatment (*Re GF (Medical Treatment)* [1992] 1 FLR 293), or for a proposed abortion which complies with the terms of the Abortion Act 1967 (*Re G (Mental Patient: Termination of Pregnancy)* (1991) Times, 31 January; and see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 209).

See also *Re W (An Adult: Sterilisation)* [1993] 2 FCR 187, [1993] 1 FLR 381 (notwithstanding the small risk that a young woman, a mentally handicapped epileptic with a mental age of seven, would become pregnant, in the circumstances sterilisation was in her best interests). As to the Court of Appeal guidelines for the obtaining of a declaration, and the correct procedure to be followed, see *St George's Healthcare NHS Trust v S (No 2)*, *R v Collins, ex p S (No 2)* [1998] 3 All ER 673, [1998] 2 FCR 685, CA. See also *Re X (Adult Patient: Sterilisation)* supra. The fact that there is a responsible body of opinion against the proposed treatment is merely a relevant factor for the court in determining whether such treatment is medically necessary: *R (on the application of N) v M* [2002] EWCA Civ 1789, [2003] 1 WLR 562, [2003] 1 FCR 124. For guidelines as to when it is necessary to seek a declaration in order to terminate the pregnancy of a mentally incapacitated patient see *D v An NHS Trust (Medical Treatment: Consent: Termination)* [2003] EWHC 2793 (Fam), [2004] 1 FLR 1110. As to the procedure for applying for declaratory relief, including a declaration as to the lawfulness of performing a sterilisation operation on a mentally incompetent adult, see *Practice Note* [2001] 2 FCR 569. As to the jurisdiction of the High Court in such cases see *Practice Direction* [2002] 1 All ER 794.

5 See PARA 551 ante.

6 See PARAS 553-558 ante.

7 *Ie* under the Family Law Reform Act 1969 s 20 (as amended): see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 113 et seq.

8 Ibid s 21(4) (amended by the Mental Health Act 1983 s 148, Sch 4 para 25; and the Family Reform Act 1987 s 33(1), Sch 2 para 22). See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 114. As from a day to be appointed, the Family Law Reform Act 1969 s 21(4) (as amended) is substituted so as to refer to consent by a donee of a power of attorney or a deputy appointed or person authorised by the Court of Protection: see s 21(4) (prospectively substituted by the Mental Capacity Act 2005 s 67(1), Sch 6 para 15). At the date at which this volume states the law no such day had been appointed. See also PARAS 406, 595 ante.

UPDATE

613 Effect of lack of capacity to consent

NOTE 3--The test of 'medical necessity' is a single question of whether the proposed treatment is medically or therapeutically necessary, not whether each of the individual matters going to the test of medical necessity has been proved: *R (on the application of B) v Haddock* [2006] EWCA Civ 961, (2006) 93 BMLR 52.

NOTE 4--*Practice Note* [2001] 2 FCR 569 superseded by *Practice Note (Official Solicitor: Declaratory Proceedings: Medical and Welfare Decisions for Adults who Lack Capacity)* [2006] 2 FLR 373.

NOTE 8--Day now appointed: SI 2007/1897.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(2) CIVIL CAPACITY/(vi) Marriage and Divorce/614. Marriage.

(vi) Marriage and Divorce

614. Marriage.

A marriage celebrated after 31 July 1971 is voidable on the ground that either party did not validly consent to it in consequence of unsoundness of mind¹. A marriage celebrated before that date where either party did not validly consent because of unsoundness of mind is void². To be capable of giving a valid consent, a person must be able to understand the nature of the marriage contract³. This being relatively simple, the degree of understanding required may not be as great as it is for the purpose of making a valid will⁴.

A marriage celebrated after 31 July 1971 is also voidable on the ground that at the time of the marriage either party, although capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Health Act 1983 of such a kind or to such an extent as to be unfitted for marriage⁵. Proceedings must be instituted within three years from the date of the marriage, unless leave is obtained to institute them after that date on the ground that the petitioner has at some time during that period suffered from mental disorder within the meaning of the Mental Health Act 1983 and in all the circumstances it would be just to grant leave⁶. A marriage celebrated before that date was voidable on similar grounds⁷.

Special provision is made to enable the marriage of a person who is detained in hospital for treatment⁸ to be solemnised, on the authority of certificates of a superintendent registrar⁹, at the hospital¹⁰.

1 Matrimonial Causes Act 1973 s 12(c). The date mentioned in the text is the day before that on which the Nullity of Marriage Act 1971 came into force. See also MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 331.

2 Such a marriage would not, therefore, revoke a previous will. For the view that the law was changed in 1971 see *Re Roberts, Roberts v Roberts* [1978] 3 All ER 225 at 226-227, [1978] 1 WLR 653 at 655 per Walton J.

3 *Durham v Durham* (1885) 10 PD 80; *Hunter v Edney* (1885) 10 PD 93.

4 See *Re Park's Estate, Park v Park* [1954] P 89, [1953] 2 All ER 1411, CA; and see *Boughton v Knight* (1873) LR 3 P & D 64 at 72. See also *Sheffield City Council v E* [2004] EWHC 2808 (Fam), [2005] Fam 326, which approved the test in *Re Park's Estate, Park v Park* supra, that the person had to understand the nature of the marriage contract and be mentally capable of understanding the duties and responsibilities that normally attached to marriage. The court has no jurisdiction to determine whether marriage in general or to a particular person is in the person's best interests. *Sheffield City Council v E* supra was considered in a case dealing with an arranged marriage, where the capacity of a person to enter into a marriage contract was considered and it was held that in appropriate circumstances there is jurisdiction to make an order to restrain those responsible for an adult lacking capacity from entering into a contract of marriage whether formal or informal if it is required to protect the best interests of the adult: *M v B* [2005] EWHC 1681 (Fam), (2005) Times, 10 August. In a case dealing with a forced marriage, the court assumed jurisdiction to grant declaratory relief in respect of competent adults who were deprived of the capacity to make their own decisions: the court could make orders, give directions and injunctive relief designed to ascertain whether the person concerned had been allowed to exercise free will in decisions concerning her civil status and country of residence: *Re SK (An Adult) (Forced Marriage: Appropriate Relief)* [2004] EWHC 3202 (Fam), [2005] 3 All ER 421.

5 Matrimonial Causes Act 1973 s 12(d) (amended by the Mental Health Act 1983 s 148(1), Sch 4 para 34). See also MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 331. Where a petition is presented on the ground of the respondent's mental disorder, the petitioner cannot proceed without leave of the district judge: Family Proceedings Rules 1991, SI 1991/1247, r 9.4.

6 Matrimonial Causes Act 1973 s 13(2) (substituted by the Matrimonial and Family Proceedings Act 1984 s 2; and amended by the Gender Recognition Act 2004 s 11, Sch 4 Pt 1 paras 4, 6); Matrimonial Causes Act 1973 s 13(4) (added by the Matrimonial and Family Proceedings Act 1984 s 2; and amended by the Gender Recognition Act 2004 s 11, Sch 4 Pt 1 paras 4, 6). Applications for leave may be made after the three year period: Matrimonial Causes Act 1973 s 13(5) (added by the Matrimonial and Family Proceedings Act 1984 s 2). See also MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 321-322.

7 A marriage celebrated before 1 August 1971 was voidable on the ground that either party was of unsound mind, or was suffering from mental disorder within the meaning of the Mental Health Act 1959 of such a kind or to such an extent as to be unfitted for marriage and the procreation of children, or was subject to recurrent attacks of insanity or epilepsy; and a marriage celebrated before 1 November 1960 was voidable on the ground that either party was of unsound mind, or a mental defective within the meaning of the Mental Deficiency Acts 1913 to 1938, or subject to recurrent fits of insanity or epilepsy: Matrimonial Causes Act 1973 s 53, Sch 1 para 11(1)(b), (2). However, proceedings had to be instituted within a year of the marriage: Sch 1 para 11(3). See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 345.

8 le otherwise than under the Mental Health Act 1983 s 2, s 4, s 5, s 35, s 36 or s 136 (see PARAS 460, 462-463, 489, 550 ante): Marriage Act 1983 s 1(3).

9 le issued under the Marriage Act 1949 Pt III (ss 26-52) (as amended).

10 le at the place where the patient usually resides: see the Marriage Act 1983 s 1(1) (amended by the Immigration and Asylum Act 1999 s 169(1), Sch 14 para 77(a)). Each notice of the marriage must be accompanied by a statement, made in the prescribed form by the hospital managers not more than 21 days before the date on which notice is given, identifying the hospital where the patient is detained and stating that the managers have no objection to its being specified as the place where the marriage is to be solemnised: see the Marriage Act 1949 s 27A(3) (added by the Marriage Act 1983 s 1(7), Sch 1 para 6; and amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 9(a)).

UPDATE

614 Marriage

NOTE 2--See also *City of Westminster v C* [2008] EWCA Civ 198, [2009] 2 WLR 185, [2008] 2 FCR 146; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 332.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(2) CIVIL CAPACITY/(vi) Marriage and Divorce/615. Divorce.

615. Divorce.

Mental disorder or incapacity does not of itself either dissolve a valid marriage or constitute one of the facts of which the petitioner has to satisfy the court in order that it may hold that the marriage has irretrievably broken down¹. However, one of those facts is desertion for two years², and the court may treat a period of desertion as continuing at a time when the deserting party was incapable of continuing the necessary intention if the evidence is such that the court would have inferred that his intention would have continued had he not been so incapable³. Another such fact is that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him⁴, and such behaviour may be the result of mental disorder⁵. A further such fact is that the parties have lived apart for two years and the respondent consents to a decree⁶; the capacity to give such consent is the same as that required to consent to marriage⁷. Finally, if the parties have lived apart for five years⁸, a divorce may be granted, unless the respondent proves that the dissolution of the marriage will cause him grave financial or other hardship and that in all the circumstances it would be wrong to dissolve the marriage⁹.

The fact that one party is incapable through mental disorder of managing his property and affairs does not debar the other party from claiming and obtaining orders for financial provision and property adjustment in the divorce court, even where a receiver has been appointed¹⁰. Where the divorce court makes an order¹¹ in favour of a party to a marriage and is satisfied that that party is so incapable¹² then, subject to any order, direction or authority made or given in relation to that party under the Mental Health Act¹³, the court may order the payments to be made, or property transferred, to such persons having charge of that party as the court may direct¹⁴.

1 le for the purpose of granting a decree of divorce: Matrimonial Causes Act 1973 s 1(1), (2). A decree of judicial separation may be granted on proof of any of those facts: s 17(1). See MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 346-347. The provisions of s 1 (as amended) and ss 2, 5, 17 are repealed by the Family Law Act 1996 s 66(3), Sch 10 as from a day or days to be appointed under s 67. At the date at which this title states the law, no such day or days had been appointed.

2 Matrimonial Causes Act 1973 s 1(2)(c). See note 1 supra.

3 Ibid s 2(4). As to the effect of mental disorder on desertion generally see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 389. See note 1 supra.

4 Ibid s 1(2)(b). See note 1 supra.

5 *Katz v Katz* [1972] 3 All ER 219, [1972] 1 WLR 955; *Thurlow v Thurlow* [1976] Fam 32, [1975] 2 All ER 979. See also *Williams v Williams* [1964] AC 698, [1963] 2 All ER 994, HL (a case under the former law of cruelty); *J (HD) v J (AM)* [1980] 1 All ER 156, [1980] 1 WLR 124 (applying the same approach to conduct so far as it is relevant to financial provision). However, it may be reasonable to expect the petitioner to be more tolerant of behaviour which is the result of illness: *Richards v Richards* [1972] 3 All ER 695, [1972] 1 WLR 1073. See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 360.

6 Matrimonial Causes Act 1973 s 1(2)(d). See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 347, 407. See note 1 supra.

7 *Mason v Mason* [1972] Fam 302 at 306, [1972] 3 All ER 315 at 317-318 (a person may have this capacity even if he is incapable of managing his property and affairs and is therefore represented by the Official Solicitor as his litigation friend (formerly 'guardian ad litem'); however, the consent must be that of the respondent personally and not of his guardian). See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 408. As to the test of capacity to marry see PARA 614 ante. As to the power of the Court of Protection to conduct legal

proceedings, including divorce proceedings, on the patient's behalf see the Mental Health Act 1983 s 96(1)(i); and PARAS 683, 703 post. As to the Official Solicitor see PARA 748 post.

8 Matrimonial Causes Act 1973 s 1(2)(e). See MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 410. See note 1 supra.

9 Ibid s 5(1). See MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 411. See note 1 supra.

10 *CL v CFW* [1928] P 223. See also *Jones v Jones* [1985] QB 704, [1984] 3 All ER 1003, CA; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 542. As to the power of the Court of Protection to provide for a patient's relations see PARAS 682-683, 685 post.

11 Ie under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) (as amended; prospectively amended) requiring payments (including a lump sum payment) to be made or property to be transferred.

12 Ie incapable by reason of mental disorder within the meaning of the Mental Health Act 1983 of managing and administering his property and affairs.

13 The court will not usurp the jurisdiction of the Court of Protection: *Swettenham v Swettenham* [1939] 3 All ER 989, CA. As to the power of the Court of Protection to authorise the conduct of divorce and other family proceedings on a patient's behalf see PARA 703 post.

14 Matrimonial Causes Act 1973 s 40. This provision is also applied to interim orders and orders for financial provision and property adjustment after foreign divorce under the Matrimonial and Family Proceedings Act 1984 ss 14, 17 (s 17 as amended; prospectively amended): see s 21(k); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 455. As from a day to be appointed the Matrimonial Causes Act 1973 s 40 is substituted so as to refer to a person lacking capacity under the Mental Capacity Act 2005: Matrimonial Causes Act 1973 s 40 (prospectively amended by the Mental Capacity Act 2005 s 67(1), Sch 6 para 19). At the date at which this volume states the law no such day had been appointed. See also PARAS 406, 595 ante.

UPDATE

615 Divorce

NOTE 14--Day now appointed: SI 2007/1897.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(2) CIVIL CAPACITY/(vii) Domicile/616. Domicile.

(vii) Domicile

616. Domicile.

The domicile of a mentally incapacitated person cannot be changed either by his own act or by the person having charge of him¹.

¹ See CONFLICT OF LAWS vol 8(3) (Reissue) PARA 56. There may be an exception for persons whose incapacity arose during childhood and who may continue to be governed by the rules relating to dependent children.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(2) CIVIL CAPACITY/(viii) Evidence/617. Competence.

(viii) Evidence

617. Competence.

A person is not competent to give evidence unless he understands, not only the duty to tell the truth, but also the extra obligation and sanction involved in taking an oath or affirmation¹. In criminal cases, it may be necessary to warn the jury in clear terms of the danger of convicting on the unsupported evidence of patients from hospitals providing high security psychiatric services².

1 *R v Dunning* [1965] Crim LR 372, CCA. See also *R v Hill* (1851) 2 Den 254; *R v Whitehead* (1866) LR 1 CCR 33; and CIVIL PROCEDURE vol 11 (2009) PARA 966. Where the question arises, the judge should conduct a preliminary inquiry: *Spittle v Walton* (1871) LR 11 Eq 420.

2 See *R v Spencer* [1987] AC 128, [1986] 3 All ER 928, HL. As to patients from hospitals providing high security psychiatric services (formerly special hospitals) see PARA 418 et seq ante.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(2) CIVIL CAPACITY/(viii) Evidence/618. Confessions.

618. Confessions.

Where the prosecution case relies wholly or mainly on the confession of a mentally handicapped person made without an independent person present, the judge is required to warn the jury that there is a special need for caution before convicting in reliance upon it¹. The Code of Practice for the detention, treatment and questioning of persons by police officers² makes special provision for the questioning of people who are suspected of being mentally ill, mentally handicapped or unable to understand the significance of questions put to them³.

¹ Police and Criminal Evidence Act 1984 s 77 (amended by the Police Act 1996 s 103, Sch 7 para 38). See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1544. As to confessions generally see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARAS 1540-1549. As from a day to be appointed the Police and Criminal Evidence Act 1984 s 77 (as amended) is further amended to cover situations with and without a jury: s 77 (prospectively amended by the Criminal Justice Act 2003 s 331, Sch 36 Pt 4 para 48). At the date at which this volume states the law no such day had been appointed.

² Made in pursuance of the Police and Criminal Evidence Act 1984 ss 66, 67(7) (as amended). As to the Codes of Practice see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARAS 856.

³ See Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1540.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(3) DISQUALIFICATIONS/619. Voting.

(3) DISQUALIFICATIONS

619. Voting.

At common law, persons of unsound mind and idiots are disqualified from voting in Parliamentary and local elections¹. Persons who have the capacity to vote must, however, be registered to do so in a constituency where they were resident on the qualifying date and must fulfil other relevant qualifications². A person detained in pursuance of certain orders or directions³ or unlawfully at large when he would otherwise be so detained is legally incapable of voting at any parliamentary or local government election⁴. A person who is a patient in a mental hospital⁵ (whether or not he is liable to be detained there) but who is not a detained offender or a person remanded in custody⁶ is to be regarded⁷ as resident at the mental hospital in question if the length of the period which he is likely to spend at the hospital is sufficient for him to be regarded as being resident there for the purposes of electoral registration⁸. Such a person registered in a register of electors is entitled to remain so registered until the end of the period of 12 months beginning with the date when the entry in the register first takes effect, or another entry in respect of him in any register of electors takes effect (whether or not in pursuance of such an application), whichever first occurs⁹.

¹ See ELECTIONS AND REFERENDUMS vol 15(3) (2007 Reissue) PARA 122.

² See the Representation of the People Act 1983 ss 1, 2 (both substituted by the Representation of the People Act 2000 s 1(1)). See ELECTIONS AND REFERENDUMS vol 15(3) (2007 Reissue) PARA 110 et seq. As to European elections see ELECTIONS AND REFERENDUMS vol 15(3) (2007 Reissue) PARA 115.

³ The orders include those under the Mental Health Act 1983 s 37 (as amended) (see PARA 491 ante), s 38 (as amended) (see PARAS 491, 494 ante), s 44 (see PARA 498 ante) or s 51(5) (see PARA 539 ante); and the directions include those under s 45A (as added and amended) (see PARA 490 ante), s 47 (as amended) (see PARA 535 ante): see the Representation of the People Act 1983 s 3A(2)(a) (s 3A added by the Representation of the People Act 2000 s 2). Other orders are orders under the Criminal Procedure (Insanity) Act 1964 s 5(2)(a) (as substituted) (see PARA 499 ante; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 332) and orders by the Court of Appeal under the Criminal Appeal Act 1968 s 6(2)(a) or s 14(2)(a) (as substituted) (see PARA 500 ante; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARAS 1883, 1889): see the Representation of the People Act 1983 s 3A(2)(b), (c) (as so added). Finally other orders are hospital orders under the Army Act 1955 s 116A (as added), the Air Force Act 1955 s 116A (as added), the Naval Discipline Act 1957 s 63A (as added), or the Courts-Martial (Appeals) Act 1968 s 16 or s 23 (as substituted) (see PARA 499 ante; and ARMED FORCES): see the Representation of the People Act 1983 s 3A(5) (as so added; and substituted by the Domestic Violence, Crime and Victims Act 2004 s 59, Sch 12 para 8(1), (2)(d)).

⁴ Representation of the People Act 1983 s 3A(1) (as added: see note 3 supra).

⁵ 'Mental hospital' means any establishment (or part of an establishment) maintained wholly or mainly for the reception and treatment of persons suffering from any form of mental disorder; and for these purposes, 'mental disorder' has the same meaning as in the Mental Health Act 1983 (see PARA 402 ante); Representation of the People Act 1983 s 7(6) (s 7 substituted by the Representation of the People Act 2000 s 4).

⁶ I.e. a person to whom the Representation of the People Act 1983 s 3A (as added and amended) (disfranchisement of offenders detained in mental hospitals) or s 7A (as added) (residence: persons remanded in custody etc) applies.

⁷ I.e. for the purposes of *ibid* s 4 (as substituted) (entitlement to be registered as parliamentary or local government elector).

⁸ See *ibid* s 7(1), (2) (as substituted: see note 5 supra). Section 7(2) (as substituted) must not be taken as precluding registration of a person to whom s 7 (as substituted) applies by virtue of his residence at some place

other than the mental hospital in which he is a patient, or in pursuance of a declaration of local connection: s 7(5) (as so substituted). See ELECTIONS AND REFERENDUMS vol 15(3) (2007 Reissue) PARA 134.

9 Ibid s 7(3) (as substituted: see note 5 supra). Where the entitlement of such a person to remain registered so terminates, the registration officer concerned must remove that person's entry from the register, unless he is entitled to remain registered in pursuance of a further application: s 7(4) (as so substituted).

UPDATE

619 Voting

NOTE 3--Representation of the People Act 1983 s 3A(5) further substituted: Armed Forces Act 2006 Sch 16 para 96.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(3) DISQUALIFICATIONS/620. Jury service.

620. Jury service.

Any person who suffers or has suffered from mental illness¹, psychopathic disorder², mental handicap or severe mental handicap³ and on account of that condition is either resident in a hospital or other similar institution or regularly attends for treatment by a medical practitioner, any person for the time being under guardianship under the Mental Health Act 1983⁴, or any person who has been determined by a judge to be incapable by reason of mental disorder of managing and administering his property and affairs⁵, is ineligible for jury service⁶.

1 This term is not statutorily defined; but see PARA 402 ante.

2 For the meaning of 'psychopathic disorder' see PARA 403 ante.

3 'Mental handicap' means a state of arrested or incomplete development of mind (not amounting to severe mental handicap) which includes significant impairment of intelligence and social functioning; and 'severe mental handicap' means a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning: Juries Act 1974 s 1, Sch 1 Pt 1 para 4 (s 1, Sch 1 Pt 1 substituted by the Criminal Justice Act 2003 s 321, Sch 33 paras 1, 2, 15; and the Juries Act 1974 Sch 1 Pt 1 para 4 amended by the Domestic Violence, Crime and Victims Act 2004 s 58(2), Sch 11).

4 Ie within the meaning of the Mental Health Act 1983 s 7. As to such guardianship see PARAS 469, 502 ante.

5 Ie under ibid Pt VII (ss 93-113) (as amended; prospectively amended and repealed). As to such determinations see PARA 681 post.

6 Juries Act 1974 s 1, Sch 1 Pt I paras 1-3 (as substituted: see note 3 supra). As from a day to be appointed, Sch 1 Pt I para 3 (as substituted) is further substituted so as to refer to a person lacking capacity within the meaning of the Mental Capacity Act 2005 to serve as a juror: Juries Act 1974 Sch 1 Pt I para 3 (prospectively substituted by the Mental Capacity Act 2005 s 67(1), Sch 6 para 20). At the date at which this volume states the law no such day had been appointed. As to the Mental Capacity Act 2005 generally see also PARAS 406, 595 ante.

UPDATE

620 Jury service

NOTE 6--Day now appointed: SI 2007/1897.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(3) DISQUALIFICATIONS/621. Driving.

621. Driving.

The Secretary of State must refuse to grant a driving licence to, or must revoke an existing licence of, a person suffering from a prescribed disability¹: these include severe mental disorder² and epilepsy³.

1 See the Road Traffic Act 1988 s 92 (as amended); and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARAS 455-459, 462-466. As to types of licences and licensing generally see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 443 et seq.

2 'Severe mental disorder' includes mental illness, arrested or incomplete development of the mind, psychopathic disorder and severe impairment of intelligence and social functioning: Motor Vehicles (Driving Licences) Regulations 1999, SI 1999/2864, reg 71(4)(a).

3 See the Road Traffic Act 1988 s 92(2); and the Motor Vehicles (Driving Licences) Regulations 1999, SI 1999/2864, reg 71(1). The grant cannot be refused if the applicant for a Group 1 licence who has epilepsy has satisfied certain conditions and has been free from attacks for one year, or has for three years only had attacks while asleep: see reg 72(2), (2A) (reg 72(2) amended, and reg 72(2A) added, by SI 2003/166); and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 446. As to the relevance of epilepsy in the case of applicants for a Group 2 licence see the Motor Vehicles (Driving Licences) Regulations 1999, SI 1999/2864, reg 73(8); and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 455.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(3) DISQUALIFICATIONS/622. Firearm certificates.

622. Firearm certificates.

A firearm certificate may be revoked by the chief officer for police for the area in which the holder resides if he has reason to believe that the holder is of intemperate habits or unsound mind or is otherwise unfit to be trusted with a firearm¹.

¹ Firearms Act 1968 s 30A(1), (2)(a) (s 30A added by the Firearms Act 1997 s 40). See CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 685.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(3) DISQUALIFICATIONS/623. Membership of Parliament.

623. Membership of Parliament.

There is a statutory procedure for vacating the seat of a member of the House of Commons who has been compulsorily detained because of mental illness for six months or more¹. There appears to be no similar provision for members of the House of Lords, but a court or authority ordering the imprisonment or restraint of a member of the House of Lords is usually required to give written notice to the Clerk of the Parliaments².

¹ See the Mental Health Act 1983 s 141 (as amended); para 445 ante; and PARLIAMENT vol 78 (2010) PARAS 900, 1094.

² There has been an indication that the provisions for mentally disordered persons under the Mental Health Act 1983 ss 2-6 override any privilege of Parliament or peerage: see PARLIAMENT vol 78 (2010) PARA 1085. See also HL Standing Orders (Public Business) (1994) no 79.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(3) DISQUALIFICATIONS/624. Solicitors.

624. Solicitors.

The Law Society¹ may refuse to issue a practising certificate to a solicitor whilst, by reason of mental disorder, he is a patient² or a person in respect of whom the emergency powers of managing property and affairs³ have been exercised⁴.

1 As to the Law Society see LEGAL PROFESSIONS vol 65 (2008) PARA 604 et seq.

2 Ie as defined by the Mental Health Act 1983 s 94 (as amended): see PARA 681 post.

3 Ie under ibid s 98: see PARA 684 post.

4 Solicitors Act 1974 s 12(1)(j), (4) (s 12(1)(j) amended by the Mental Health Act 1983 s 148(1), Sch 4 para 38). See LEGAL PROFESSIONS vol 66 (2009) PARA 898. As from a day to be appointed, the Solicitors Act 1974 s 12(1)(j) (as amended) is substituted so as to refer to lack of capacity under the relevant provisions of the Mental Capacity Act 2005: Solicitors Act 1974 s 12(1)(j) (prospectively substituted by the Mental Capacity Act 2005 s 67(1), Sch 6 para 22(1), (2)). At the date at which this volume states the law no such day had been appointed. As to the Mental Capacity Act 2005 generally see also PARAS 406, 595 ante.

UPDATE

624 Solicitors

NOTE 4--Day now appointed: SI 2007/1897.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(3) DISQUALIFICATIONS/625. Pharmacists.

625. Pharmacists.

If a registered pharmacist¹ becomes mentally disordered, his receiver² may, on certain conditions, carry on the business for a period of three years or such longer period as may be directed³.

1 As to registered pharmacists see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 880 et seq.

2 I.e. a receiver appointed under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed): see PARA 704 post.

3 Medicines Act 1968 s 72(1)(c), (3)(d), (4)(c). See MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 913. The direction for a longer period is made by a statutory committee appointed under the Pharmacy Act 1954 s 7: see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARAS 917-919. As from a day to be appointed, the Medicines Act 1968 s 72(1)(c), (3)(d), (4)(c) is amended so as to refer to becoming a person lacking capacity (within the meaning of the Mental Capacity Act 2005) to carry on business instead of the appointment of a receiver: see the Medicines Act 1968 s 72(1)(c), (1A), (3)(d), (4)(c) (s 72(1)(c), (3)(d), (4)(c) prospectively amended, and s 72(1A) prospectively added, by the Mental Capacity Act 2005 s 67(1), Sch 6 para 14(a), (b), (c)(ii), (d)). At the date at which this volume states the law no such day had been appointed. As to the Mental Capacity Act 2005 generally see also PARAS 406, 595 ante.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(3) DISQUALIFICATIONS/626. Trustees.

626. Trustees.

Where a trustee¹ is incapable of acting, the person or persons nominated by the trust instrument, if any, has or have statutory power to appoint a new trustee in his place². If there is no such person or no such person able and willing to act³, the surviving or continuing trustees or trustee or the personal representative of the last surviving or continuing trustee may appoint a new trustee in place of the trustee who is incapable⁴; however, if the trustee is incapable of exercising his functions by reason of mental disorder⁵ and is also entitled in possession to some beneficial interest in the trust property, no appointment under this power may be made without leave of the authority having jurisdiction under Part VII of the Mental Health Act 1983⁶.

The court⁷ may appoint a new trustee whenever it is found inexpedient, difficult or impracticable to do so without its assistance, and in particular may appoint a new trustee in place of a trustee who is incapable by reason of mental disorder⁸ of exercising his functions as such⁹.

If land subject to a trust of land is vested, either solely or jointly with any other person or persons, in a person who is incapable, by reason of mental disorder, of exercising his functions as trustee, a new trustee must be appointed in his place before the legal estate is dealt with by the trustees¹⁰.

1 For the meaning of 'trustee' see the Trustee Act 1925 s 68(1) PARA (17); and TRUSTS vol 48 (2007 Reissue) PARA 601.

2 Ibid s 36(1)(a). See TRUSTS vol 48 (2007 Reissue) PARA 836.

3 However, the Court of Protection has power to exercise a power of appointing new trustees which is vested in a patient: see PARA 719 post. As to the Court of Protection see PARA 676 post.

4 Trustee Act 1925 s 36(1)(b). See TRUSTS vol 48 (2007 Reissue) PARA 836. The powers conferred by the Trustee Act 1925 on trustees are in addition to any powers conferred by any instrument creating the trust, but apply only so far as a contrary intention is not expressed in the instrument: s 69(2).

5 For the meaning of 'mental disorder' see PARA 402 ante; definition applied by the Trustee Act 1925 s 36(9) (substituted by the Mental Health Act 1959 s 149(1), Sch 7 Pt I; and amended by the Mental Health Act 1983 s 148(1), Sch 4 para 4(a)). As from a day to be appointed, the Trustee Act 1925 s 36(9) (as substituted and amended) is further amended so as to refer to lacking capacity rather than being incapable by reason of mental disorder and to the Court of Protection rather than to the relevant authority under the Mental Health Act 1983: Trustee Act 1925 s 36(9) (as so substituted and amended; prospectively amended by the Mental Capacity Act 2005 s 67(1), Sch 6 para 3(1), (2)(b)). At the date at which this volume states the law no such day had been appointed. As to the Mental Capacity Act 2005 generally see also PARAS 406, 595 ante.

6 Ie the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed): Trustee Act 1925 s 36(9) (as substituted and amended; prospectively amended (see note 5 supra)). As to the construction of references to that authority see PARA 675 post. As to applications to the Court of Protection for leave see PARA 718 post. See also TRUSTS vol 48 (2007 Reissue) PARA 838.

7 'Court' means the High Court or the county court where those courts respectively have jurisdiction: ibid s 67(1) (amended by the Courts Act 1971 s 56, Sch 11 Pt II). As to the High Court see COURTS vol 10 (Reissue) PARA 351 et seq. As to county courts see COURTS vol 10 (Reissue) PARA 701 et seq.

8 For the meaning of 'mental disorder' see note 5 supra.

9 Trustee Act 1925 s 41(1) (amended by the Mental Health Act 1959 Sch 7 Pt I; the Criminal Law Act 1967 s 10, Sch 3 Pt III; and the Mental Health Act 1983 Sch 4 para 4 (b)). See TRUSTS vol 48 (2007 Reissue) PARAS 849, 856; and see *Re Sparrow* (1870) 5 Ch App 662; *Re Heaphy's Trusts* (1870) 18 WR 1070. As from a day to be

appointed, the Trustee Act s 41(1) (as amended) is further amended so as to refer to lacking capacity to exercise the functions instead of to lacking capacity to exercise functions by reason of mental disorder under the Mental Health Act 1983: Trustee Act s 41(1) (as so amended; prospectively amended by the Mental Capacity Act 2005 Sch 6 para 3(1), (3)). At the date at which this volume states the law no such day had been appointed. See note 5 supra.

The power does not extend to the appointment of a personal representative: Trustee Act 1925 s 41(4). As to the position where a personal representative is incapacitated see PARA 627 post. The powers of the High Court include power to authorise the remuneration of a trust corporation (see s 42; and TRUSTS vol 48 (2007 Reissue) PARA 801), to make vesting orders, eg where a trustee is under disability (see ss 44, 51 (as amended); and TRUSTS vol 48 (2007 Reissue) PARAS 875-876, 884-888), or to appoint a person to convey land (see s 50; and TRUSTS vol 48 (2007 Reissue) PARA 879), and to charge the costs of certain applications on the trust estate (see s 60; and TRUSTS vol 48 (2007 Reissue) PARAS 853, 873). The county court has jurisdiction under these provisions in a case where the trust estate does not exceed the county court limit: see the Trustee Act 1925 s 63A (added by the County Courts Act 1984 s 148(1), Sch 2 Pt I para 1). The county court limit is £30,000: see the County Courts Jurisdiction Order 1981, SI 1981/1123. For the circumstances in which the Court of Protection may also have jurisdiction see PARAS 720-721 post.

10 Law of Property Act 1925 s 22(2) (substituted by the Mental Health Act 1959 Sch 7 Pt I; and amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 4(6)). As from a day to be appointed, the Law of Property Act 1925 s 22(2) (as substituted and amended) is further amended so that the reference to lacking capacity to exercise functions by reason of mental disorder under the Mental Health Act 1983 is replaced by a reference to lacking capacity (within the meaning of the Mental Capacity Act 2005) to exercise the functions: Law of Property Act 1925 s 22(2) (as so substituted and amended; prospectively amended by the Mental Capacity Act 2005 Sch 6 para 4(1), (2)(b)). At the date at which this volume states the law no such day had been appointed. See note 5 supra.

The Law of Property Act 1925 s 22(2) (as substituted and amended; prospectively amended) does not prevent a legal estate being dealt with without the appointment of a new trustee, or the discharge of the incapable trustee, at a time when the donee of an enduring power (within the meaning of the Enduring Powers of Attorney Act 1985: see PARA 673 post) is entitled to act for the incapable trustee in the dealing: Law of Property Act 1925 s 22(3) (added by the Trustee Delegation Act 1999 s 9(1)). As from a day to be appointed, the Law of Property Act 1925 s 22(3) (as added) is amended so that the reference to the enduring power (within the meaning of the Enduring Powers of Attorney Act 1985) is replaced by a reference to the enduring or lasting power of attorney (within the meaning of the Mental Capacity Act 2005): Law of Property Act 1925 s 22(3) (as so added; prospectively amended by the Mental Capacity Act 2005 Sch 6 para 4(1), (2)(c)). At the date at which this volume states the law no such day had been appointed. See note 5 supra.

As to conveyances etc on behalf of persons suffering from mental disorder see the Law of Property Act 1925 s 22(1) (as substituted and amended; prospectively amended); and PARA 687 post.

UPDATE

626 Trustees

NOTE 5--Day now appointed: SI 2007/1897.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(3) DISQUALIFICATIONS/627. Executors and administrators.

627. Executors and administrators.

Where a person entitled to a grant of administration of an estate is by reason of mental disorder incapable of managing his affairs, a grant of administration may be made to another person during the period of mental incapacity; similarly, if a person becomes so incapable after a grant, a new grant may be made¹.

If any person who would otherwise be protector of a settlement² is so incapable, the judge having jurisdiction under Part VII of the Mental Health Act 1983³ is substituted⁴.

¹ See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 17, 212 et seq, 259. As to the replacement of trustees who become mentally disordered see PARAS 626 ante, 718-721 post.

² As to the protector of a settlement see REAL PROPERTY vol 39(2) (Reissue) PARA 124 et seq.

³ ie under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed). As to the judge see PARA 674 post.

⁴ Fines and Recoveries Act 1833 s 33 (amended by the Statute Law Revision (No 2) Act 1888; the Mental Health Act 1959 s 149(1), Sch 7; the Criminal Law Act 1967 s 10, Sch 3 Pt I; and the Mental Health Act 1983 s 148(1), Sch 4 para 1). See REAL PROPERTY vol 39(2) (Reissue) PARA 124. As from a day to be appointed, the Fines and Recoveries Act 1833 s 33 (as amended) is further amended so as to refer to the Court of Protection under the Mental Capacity Act 2005 instead of to the judge: Fines and Recoveries Act 1833 s 33 (as so amended; prospectively amended by the Mental Capacity Act 2005 s 67(1), Sch 6 para 1(1), (2)). At the date at which this volume states the law no such day had been appointed. As to the Mental Capacity Act 2005 generally see also PARAS 406, 595 ante.

UPDATE

627 Executors and administrators

NOTE 4--Day now appointed: SI 2007/1897.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(4) PAYMENTS OUT OF PUBLIC AND SIMILAR FUNDS/628. Application of pay, pensions, etc.

(4) PAYMENTS OUT OF PUBLIC AND SIMILAR FUNDS

628. Application of pay, pensions, etc.

Where a periodic payment¹ falls to be made to any person, by way of pay, pension or otherwise in connection with the service or employment of that or any other person, directly out of money provided by Parliament or the Consolidated Fund², or other money administered by or under the control or supervision of a government department³, the authority by which the sum in question is payable, if satisfied after considering medical evidence that the person to whom it is payable is incapable by reason of mental disorder of managing and administering his property and affairs⁴, may, instead of paying the sum to the patient, pay it or such part of it as the authority thinks fit to the institution or person having the patient's care, to be applied for his benefit⁵. The remainder, if any, of the sum, or such part of it as the authority thinks fit, may be paid to or for the benefit of persons who appear to the authority to be members of the patient's family or other persons for whom he might be expected to provide if he were not mentally disordered⁶, or in reimbursement, with or without interest, of money applied by any person either in payment of the patient's debts (whether legally enforceable or not) or for the maintenance or other benefit of the patient or such persons as have been mentioned above⁷.

1 In the case of lump sum payments, eg gratuities and commutations, which do not fall within the Mental Health Act 1983 s 142, application may be made to the Court of Protection for an order to be made as to their application under the powers conferred by ss 95, 96: see PARA 683 post. As from a day to be appointed, s 142 ceases to have effect in England and Wales: s 142 (prospectively repealed by the Mental Capacity Act 2005 s 67(1), Sch 6 para 29(1), (4)-(6)). At the date at which this volume states the law no such day had been appointed. As from a day to be appointed, the Mental Capacity Act 2005 Sch 6 para 29(6) applies where, before the commencement of Sch 6 para 29(4), an authority has, in respect of a person referred to in the Mental Health Act 1983 s 142 as 'the patient', made payments under that provision to an institution or person having the care of the patient, or in accordance with s 142(2)(a) or (b) (see the text to notes 6-7 infra): Mental Capacity Act 2005 Sch 6 para 29(5). The authority may, in respect of the patient, continue to make payments under the Mental Health Act 1983 s 142 to that institution or person, or in accordance with s 142(2)(a) or (b), despite the amendment made by the Mental Capacity Act 2005 Sch 6 para 29(4): Sch 6 para 29(6). As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

As to the power of registered industrial and provident societies to make payments to another person on behalf of a mentally incapacitated member if the Court of Protection has not assumed jurisdiction over his property and affairs see the Industrial and Provident Societies Act 1965 s 26 (prospectively amended); and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2510.

2 Examples of superannuation payable out of money provided by Parliament are civil service superannuation and a national health service pension scheme: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 565 et seq; HEALTH SERVICES vol 54 (2008) PARA 711 et seq.

3 Payments out of money administered under the supervision of a government department include payments made by the Crown Agents on behalf of governments and administrations overseas who act under the supervision of the Secretary of State for Foreign and Commonwealth Affairs: see COMMONWEALTH vol 13 (2009) PARA 823; CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 461. The Mental Health Act 1983 s 142(1) has effect as if the reference to a government department included a reference to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (as amended); and PARA 411 ante. 'Government department', however, does not include a Northern Ireland department: Mental Health Act 1983 s 142(3). Section 142 extends to Scotland: see s 146 (prospectively amended); and PARA 405 ante. See note 1 supra.

4 In *ibid* s 142, such a person is referred to as 'the patient': s 142(1). Cf the definition of 'patient' in ss 94(2), 112: see PARA 681 post. For the meaning of 'mental disorder' see PARA 402 ante. See note 1 supra.

5 Ibid s 142(1), (2). As to the application of s 142 to Scotland and to Northern Ireland see note 3 supra. Similar powers are conferred on a local authority (see LOCAL GOVERNMENT vol 69 (2009) PARA 447) and in relation to the pensions of Members of Parliament (see PARLIAMENT vol 78 (2010) PARA 926 et seq) and Church of England clergy (see ECCLESIASTICAL LAW vol 14 para 747). Where a receiver has been appointed, it will generally, but not always, be convenient for the paying authority to pay the sum to the receiver. As to receivers see generally para 704 et seq post. See note 1 supra.

6 Mental Health Act 1983 s 142(2)(a). See note 1 supra.

7 Ibid s 142(2)(b). See note 1 supra.

UPDATE

628 Application of pay, pensions, etc

NOTE 1--Day now appointed: SI 2007/1897.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(4) PAYMENTS OUT OF PUBLIC AND SIMILAR FUNDS/629. Social security benefits.

629. Social security benefits.

Where a person who is entitled to social security benefits or income support is unable to act, a suitable person may be appointed to receive them on his behalf¹.

Except where regulations otherwise provide, a person may be disqualified for receiving any benefit, and an increase of benefit will not be payable in respect of any person as the beneficiary's wife or husband for any period during which the person is in detention in legal custody². Regulations may provide for suspending payment of benefit to a person during any period in which he is undergoing medical or other treatment as an in-patient in a hospital or similar institution³.

1 See the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 33 (amended by SI 1991/2741; SI 1999/2572; SI 2002/2441; SI 2005/337). The Social Security (Claims and Payments) Regulations 1987, SI 1987/1968 (as amended) have been replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit and Children's Allowance (Administration) Regulations 2003, SI 2003/492 (amended by SI 2003/2107; SI 2003/2155; SI 2004/761; SI 2004/1240).

2 Social Security Contributions and Benefits Act 1992 s 113(1)(b). See the Social Security (General Benefit) Regulations 1982, SI 1982/1408, regs 2(6), 3 (amended by SI 1996/425); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 21. Persons liable to be detained in hospital as persons suffering from mental disorder at the conclusion of criminal proceedings are not disqualified unless, in effect, they are sentenced prisoners transferred to hospital by a transfer direction with restrictions (see PARAS 535, 537 ante): Social Security (General Benefit) Regulations 1982, SI 1982/1408, reg 2(3)(b). As from a day to be appointed, the Social Security Contributions and Benefits Act 1992 s 113(1) is amended so as to refer also to a civil partner: see s 113(1) (prospectively amended by the Civil Partnerships Act 2004 s 254(1), Sch 24 Pt 3 para 38). At the date at which this volume states the law no such day had been appointed.

3 Social Security Contributions and Benefits Act 1992 s 113(2). See SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 21.

UPDATE

629 Social security benefits

NOTE 1--SI 1987/1968 reg 33 further amended: SI 2007/2470. SI 2003/492 further amended: SI 2009/3268.

NOTE 2--SI 1982/1408 reg 2 further amended: SI 2005/2878, SI 2005/3360, SI 2009/2054, SI 2010/442. Day now appointed: SI 2005/3175. See *R (on the application of RD) v Secretary of State for Work and Pensions* [2008] EWHC 2635 (Admin), [2008] All ER (D) 317 (Oct).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(4) PAYMENTS OUT OF PUBLIC AND SIMILAR FUNDS/630. Pocket money for in-patients.

630. Pocket money for in-patients.

The Secretary of State¹ may pay to persons who are receiving treatment as in-patients, whether liable to be detained or not, in hospitals wholly or mainly used for the treatment of persons suffering from mental disorder², such amounts as he thinks fit in respect of their occasional personal expenses where it appears to him that they would otherwise be without resources to meet those expenses³.

1 As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante.

2 For the meaning of 'mental disorder' see PARA 402 ante.

3 Mental Health Act 1983 s 122(1) (amended by the Health Act 1999 s 65, Sch 4 paras 65, 66, Sch 5). The making of such payments to persons for whom hospital and specialist services are provided under the National Health Service Act 1977 are to be treated for the purposes of that Act as included among those services: Mental Health Act 1983 s 122(2). Section 122 (as amended) extends to Scotland: see s 146 (prospectively amended); and PARA 405 ante. In practice, the health service authorities make such payments only to patients admitted before 17 November 1975; patients admitted thereafter are normally entitled to social security benefits or income support, albeit at a rate reduced to pocket money level.

UPDATE

630 Pocket money for in-patients

NOTE 3--1983 Act s 122(2) amended: National Health Service (Consequential Provisions) Act 2006 Sch 1 para 67.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(5) INCOME TAX/631. Liability to income tax.

(5) INCOME TAX

631. Liability to income tax.

A trustee, guardian or receiver having the direction, control or management of the property or concern of any person suffering from mental disorder is assessable and chargeable to income tax and capital gains tax as that person would be if he were not mentally incapacitated¹.

¹ See the Taxes Management Act 1970 ss 72, 75, 77 (as amended); and INCOME TAXATION vol 23(2) (Reissue) PARAS 1243-1247.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(6) LITIGATION/632. Limitation.

(6) LITIGATION

632. Limitation.

A person of unsound mind¹ is to be treated as under a disability for the purpose of the Limitation Act 1980². Where a right of action accrues to a person under a disability the period within which the claim must be brought generally begins to run only from the time when he ceases to be under a disability³.

1 For this purpose, a person is of unsound mind if he is a person who by reason of mental disorder (within the meaning of the Mental Health Act 1983: see PARA 402 ante) is incapable of managing and administering his property and affairs: Limitation Act 1980 s 38(3) (amended by the Care Standards Act 2000 s 116, Sch 4 para 8(a)). Without prejudice to the generality of the Limitation Act 1980 s 38(3) (as amended), such a person is conclusively presumed to be of unsound mind while he is liable to be detained or subject to guardianship under the Mental Health Act 1983 (otherwise than under s 35 or s 89: see PARAS 489, 509 ante), and while he is receiving treatment for mental disorder as an in-patient in any hospital within the meaning of the Mental Health Act 1983 (see PARA 417 ante) or independent hospital or care home within the meaning of the Care Standards Act 2000 (see PARAS 421 note 5, 430 note 7 ante) without being liable to be detained under the Mental Health Act 1983 (otherwise than under s 35 or s 89), being treatment which follows without any interval a period during which he was liable to be detained or subject to guardianship under the Mental Health Act 1959 or the Mental Health Act 1983 (otherwise than under s 35 or s 89) or by virtue of any enactment repealed or excluded by the Mental Health Act 1959: Limitation Act 1980 s 38(4) (amended by the Mental Health Act 1983 s 148(1), Sch 4 para 55; and the Care Standards Act 2000 Sch 4 para 8(b)). The Limitation Act 1980 s 38(3), (4) (as amended) is repealed by the Mental Capacity Act 2005 s 67(1), (2), Sch 6 para 24(b), Sch 7 as from a day to be appointed under s 68(1). At the date at which this volume states the law no such day had been appointed. As to the Mental Capacity Act 2005 generally see also PARAS 406, 595 ante. See *Masterman-Lister v Brutton & Co*, *Masterman-Lister v Jewell* [2002] EWCA Civ 1889, [2003] 3 All ER 162, [2003] 1 WLR 1511.

2 See the Limitation Act 1980 s 38(2); and LIMITATION PERIODS vol 68 (2008) PARA 1170. As from a day to be appointed, s 38(2) is amended so as to refer to a person lacking capacity under the Mental Capacity Act 2005 to conduct legal proceedings instead of to a person of unsound mind: Limitation Act 1980 s 38(2) (prospectively amended by the Mental Capacity Act 2005 Sch 6 para 25(a)). At the date at which this volume states the law no such day had been appointed. See note 1 supra.

3 See the Limitation Act 1980 s 28 (as amended); and LIMITATION PERIODS vol 68 (2008) PARAS 1171-1179. However, the Court of Protection has power to conduct litigation on behalf of a patient: see PARAS 683, 703 post. Similarly, time does not run during a period when a creditor is unable to take action because his debtor's property and affairs are under the control of the Court of Protection (see PARAS 682, 686 post). As to the extension of time in latent damage cases see s 28A (as added); and LIMITATION PERIODS vol 68 (2008) PARA 1173.

UPDATE

632 Limitation

NOTE 1--Day now appointed: SI 2007/1897.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(6) LITIGATION/633. Solicitor's authority.

633. Solicitor's authority.

The authority of a solicitor under a retainer¹ given by a client not mentally disordered at the time of giving it ceases² as soon as the client becomes mentally disordered³. It is immaterial whether or not the solicitor was aware that the client had become mentally disordered, and if he continues to appear for him after the mental disorder has supervened he is liable in damages⁴ to the other party to the claim⁵. However, the question whether a claimant is mentally disordered is not an issue which it is competent to the defendant to raise in his defence, since, in effect, it challenges the authority of the claimant's solicitor to institute proceedings, and that is a matter which must be dealt with by an application to stay the claim⁶. A defence which sets up, or attempts to set up, such an issue may be struck out or treated as irrelevant⁷.

1 As to the principles governing the retainer of a solicitor by a client see LEGAL PROFESSIONS vol 66 (2009) PARA 763 et seq; as to retainer by mentally disordered persons see LEGAL PROFESSIONS vol 66 (2009) PARA 771.

2 As to the determination of agency on the person who has appointed an agent becoming incapacitated see PARA 606 ante. In a proper case where a solicitor has acted in litigation for a claimant, an inquiry will be directed as to the competency of the claimant at the date of the claim form to retain a solicitor: *Pomery v Pomery* [1909] WN 158.

3 *Yonge v Toynbee* [1910] 1 KB 215, CA. However, it seems that the solicitor is under a duty to furnish the person proposing to be litigation friend (formerly 'next friend' or 'guardian ad litem') with the necessary order, certificate or other document (see PARA 635 post) required under CPR 21; cf *Fore Street Warehouse Co Ltd v Durrant & Co* (1883) 10 QBD 471 at 474, DC. As to the position where the claimant becomes a patient after a claim is begun see PARA 636 post. As to representation at a mental health review tribunal see PARA 587 ante.

4 The measure of damages is the amount of costs thrown away by the other party to the claim: *Yonge v Toynbee* [1910] 1 KB 215, CA.

5 *Yonge v Toynbee* [1910] 1 KB 215, CA. As to a solicitor's continued authority to act despite his client's incapacity see *Practice Direction* (1995) 145 NLJ 1403. If the patient or donor is within the jurisdiction of the Court of Protection, the solicitor's authority to continue acting may be confirmed by the court. If a solicitor receives instructions to act for a patient or donor from someone other than the patient or donor himself, he may regard himself as having authority to act as from the date on which an application for confirmation of authority to act is received by the Court of Protection. As to the Court of Protection see PARAS 676, 681 et seq post.

6 *Richmond v Branson & Son* [1914] 1 Ch 968 at 974; *J (otherwise B) v J* [1953] P 186 at 190, [1952] 2 All ER 1129 at 1132.

7 *Richmond v Branson & Son* [1914] 1 Ch 968.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(6) LITIGATION/634. Necessity for litigation friend.

634. Necessity for litigation friend.

A patient¹ must have a litigation friend² to conduct proceedings on his behalf³. A person may not, without the permission of the court, make an application against a patient before proceedings have started or take any step in proceedings (except issuing and serving a claim form or applying for the appointment of a litigation friend⁴) until the patient has a litigation friend⁵. If a party becomes a patient during proceedings, no party may take any step in the proceedings without the permission of the court until the patient has a litigation friend⁶.

When a party ceases to be a patient, the litigation friend's appointment continues until it is ended by a court order⁷.

1 'Patient' means a person who by reason of mental disorder within the meaning of the Mental Health Act 1983 (see PARA 402 ante) is incapable of managing and administering his property and affairs: CPR 21.1(2)(b). See also CPR 2.3.

See *Masterman-Lister v Brutton & Co*, *Masterman-Lister v Jewell* [2002] EWCA Civ 1889, [2003] 3 All ER 162, [2003] 1 WLR 1511; *Phillips v Symes* (a bankrupt) [2004] EWHC 1887 (Ch), [2004] All ER (D) 592 (Jul).

2 It is the duty of a litigation friend fairly and competently to conduct proceedings on behalf of a patient; he must have no interest in the proceedings adverse to that of the patient and all steps and decisions he takes in the proceedings must be taken for the benefit of the child or patient. A person may become a litigation friend of a patient by authorisation under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed) (see PARA 681 post) or by a court order under CPR 21.6 (see PARA 636 post). As to the procedure for becoming a litigation friend without a court order see PARA 635 post. See also *Practice Direction--Children and Patients* PD 21 paras 2.1-2.5.

3 CPR 21.2. See also *Practice Direction--Children and Patients* PD 21; and CIVIL PROCEDURE vol 12 (2009) PARA 1670. The Official Solicitor (see PARA 748 post) will act on behalf of a patient where there is no one else able and willing to do so. See also CPR 6.6 (see PARA 638 post); CPR Pt 8; CPR 11; CPR 12.10; *Practice Direction--Default Judgment* PD 12; CPR 14.1(4) (see PARA 638 post); CPR 21.1(5), (6); *Practice Direction--Statements of Truth* PD 22 para 3; CPR 39.2(3)(d); CPR 48.5 (see PARA 639 post); the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) (see PARA 671 et seq post); and the Court of Protection Rules 2001, SI 2001/824 (as amended) (see PARA 676 post).

Case law decided under the former rules of court held that if a plaintiff was not in fact a patient, he could apply to have the action dismissed and the next friend ordered to pay the costs (*Palmer v Walesby* (1868) 3 Ch App 732; *Didisheim v London and Westminster Bank* [1900] 2 Ch 15, CA); in this connection an inquiry could be directed whether the plaintiff was mentally disordered and whether the action was for his benefit (*Howell v Lewis* (1891) 65 LT 672; *Pomery v Pomery* [1909] WN 158), and when it was shown that an action was not for the plaintiff's benefit the court would stay it (*Didisheim v London and Westminster Bank* supra; *New York Security and Trust Co v Keyser* [1901] 1 Ch 666 at 670; *Beall v Smith* (1873) 9 Ch App 85; *Porter v Porter* (1888) 37 ChD 420, CA; *Waterhouse v Worsnop* (1888) 59 LT 140).

The requirement for a litigation friend is unlikely to breach the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(1) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 134 et seq); *Stewart-Brady v United Kingdom* (1997) 24 EHRR CD 38. See also *Ashingdane v United Kingdom* (1985) 7 EHRR 528, ECtHR.

4 le under CPR 21.6 (see PARA 636 post).

5 CPR 21.3(2). It has been decided in the past that the litigation friend (formerly 'next friend') is not a party as such: see *Pink v JA Sharwood & Co Ltd* [1913] 2 Ch 286.

6 CPR 21.3(3). Any step taken before a patient has a litigation friend is of no effect unless the court otherwise orders: CPR 21.3(4). Pending appointment of a litigation friend, further steps in the proceedings may be taken with the permission of the court.

7 CPR 21.9(2). An application for such an order may be made by the former patient, the litigation friend or a party: CPR 21.9(3). As to relevant procedure see CPR 21.9(4)-(6). As to compromise, settlement etc on behalf of a patient see CPR 21.10. As to control of money recovered on behalf of a patient see CPR 21.11; and PARA 639 post.

UPDATE

634 Necessity for litigation friend

TEXT AND NOTES--References to patient are now to protected party: CPR Pt 21 substituted by SI 2007/2204.

NOTE 1--Definition replaced by 'protected party' which means a party, or an intended party, who lacks capacity to conduct the proceedings: CPR 2.3(1) (definition substituted by SI 2007/2204), CPR 21.1(2) (CPR Pt 21 as substituted: see TEXT AND NOTES).

See also *Bailey (by his litigation friend Ashton) v Warren* [2006] EWCA Civ 51, [2006] WTLR 753.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(6) LITIGATION/635. Appointment otherwise than by court order.

635. Appointment otherwise than by court order.

A person authorised under the Mental Health Act 1983¹ to conduct legal proceedings in the name of a patient² or on his behalf is entitled to be the litigation friend³ of the patient in any proceedings to which his authority extends⁴. If nobody has been appointed by the court or is so authorised under the Mental Health Act 1983, a person may act as a litigation friend if he: (1) can fairly and competently conduct proceedings on behalf of the patient; (2) has no interest adverse to that of the patient; and (3) where the patient is a claimant, undertakes to pay any costs which the patient may be ordered to pay in relation to the proceedings, subject to any right he may have to be repaid from the assets of the patient⁵.

If the court has not appointed a litigation friend, a person who wishes to act as a litigation friend must follow the following procedure⁶. A person authorised under the Mental Health Act 1983 must file an official copy of the order or other document which constitutes his authorisation to act⁷. Any other person must file a certificate of suitability stating that he satisfies the conditions specified in heads (1) to (3) above⁸. A person who is to act as a litigation friend for a claimant must file the above authorisation or certificate at the time when the claim is made⁹. A person who is to act as a litigation friend for a defendant must file the authorisation or certificate at the time when he first takes a step in the proceedings on behalf of the defendant¹⁰. The litigation friend must serve the certificate on every person on whom¹¹ the claim form should be served and also file a certificate of service¹² when he files the certificate of suitability¹³.

1 le under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed): see PARA 681 post.

2 For the meaning of 'patient' see PARA 634 note 1 ante.

3 As to the litigation friend see PARA 634 ante.

4 CPR 21.4(2). CPR 21.4 does not apply if the court has appointed a person to be litigation friend (see PARA 636 post): see CPR 21.4(1).

5 CPR 21.4(3).

6 CPR 21.5(1).

7 CPR 21.5(2).

8 CPR 21.5(3).

9 CPR 21.5(4).

10 CPR 21.5(5).

11 le in accordance with CPR 6.6: see PARA 638 post.

12 As to the contents of such certificate see CPR 6.10.

13 CPR 21.5(6).

UPDATE

635-636 Appointment otherwise than by court order, Appointment by court order

References to patient are now to protected party: CPR Pt 21 (substituted by SI 2007/2204).

635 Appointment otherwise than by court order

NOTE 12--CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(6) LITIGATION/636. Appointment by court order.

636. Appointment by court order.

The court may make an order appointing a litigation friend¹ and an application for such an order may be made by a person who wishes to be the litigation friend or a party². Where a person makes a claim against a patient³, the patient has no litigation friend, and either someone who is entitled to be a litigation friend files a defence or the claimant wishes to take some step in the proceedings, the claimant must apply to the court for an order appointing a litigation friend for the patient⁴.

The court may make an order: (1) directing that a person may not act as a litigation friend; (2) terminating a litigation friend's appointment; or (3) appointing a new litigation friend in substitution for an existing one⁵.

An application for either of the above orders⁶ must be served on every person on whom⁷ the claim form should be served⁸. Where an application for a court order⁹ is in respect of a patient, the application must also be served on the patient unless the court orders otherwise¹⁰. An application to change a litigation friend¹¹ must also be served on the person who is the litigation friend, or who is purporting to act as the litigation friend, when the application is made, and the person who it is proposed should be the litigation friend, if he is not the applicant¹². On an application for either order¹³, the court may appoint the person proposed or any other person complying with the relevant conditions¹⁴.

1 As to the litigation friend see PARA 634 ante.

2 CPR 21.6(1), (2).

3 For the meaning of 'patient' see PARA 634 note 1 ante.

4 CPR 21.6(3). Such an application must be supported by evidence, including consents to act, and the court may not appoint a litigation friend unless there is compliance with the conditions in CPR 21.4(3) (see PARA 635 ante); CPR 21.6(4), (5); and see *Practice Direction--Children and Patients* PD 21 paras 3.1-3.6.

5 CPR 21.7(1). Such an application must be supported by evidence and there must be compliance with the conditions in CPR 21.4(3) (see PARA 635 ante); CPR 21.7(2), (3); and see *Practice Direction--Children and Patients* PD 21 paras 4.1-4.4.

6 I.e. an order under CPR 21.6 or CPR 21.7.

7 I.e. in accordance with CPR 6.6: see PARA 638 post.

8 CPR 21.8(1).

9 I.e. an application under CPR 21.6.

10 CPR 21.8(2).

11 I.e. an application under CPR 21.7.

12 CPR 21.8(3).

13 I.e. an order under CPR 21.6 or CPR 21.7.

14 CPR 21.8(4). The conditions referred to in the text are those specified in CPR 21.4(3) (see PARA 635 ante).

UPDATE

635-636 Appointment otherwise than by court order, Appointment by court order

References to patient are now to protected party: CPR Pt 21 (substituted by SI 2007/2204).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(6) LITIGATION/637. Proceedings by foreign curator.

637. Proceedings by foreign curator.

A foreign curator or other authorised person duly appointed by a foreign court may sue in his own name and that of the patient for the recovery of the patient's property¹, but the court has a discretion as to directing the property to be handed over to the curator or other authorised person, although an order will generally be made². Appointment of a foreign curator does not displace the jurisdiction of the English court to determine what course of action is in the best interests of the person concerned³.

1 *Didisheim v London and Westminster Bank* [1900] 2 Ch 15 at 43-44, CA; *Thiery v Chalmers, Guthrie & Co* [1900] 1 Ch 80. A Scottish curator may sue and give discharges for the patient's personal estate in England: *Scott v Bentley* (1855) 1 Jur NS 394.

In *Pélegrin v Coutts & Co, Pélegrin v L Messel & Co* [1915] 1 Ch 696, the plaintiff who was the provisional administrator of the property of a foreign lunatic not so found, was empowered by the Civil Tribunal of the Seine to receive all money, securities and deeds deposited by the lunatic with the defendants, who refused to deliver up the securities and money, but required the plaintiff to bring an action in this country for their protection. It was held that, the order by the French court being substantially the same as the order made in *Didisheim v London and Westminster Bank* supra, the defendants, in refusing to act on the order of the French court, had exercised undue caution and were not entitled to costs against the plaintiff.

2 *Re Knight* [1898] 1 Ch 257, CA; *New York Security and Trust Co v Keyser* [1901] 1 Ch 666; *Re Hill* [1900] 1 IR 349; *Re Barlow's Will* (1887) 36 ChD 287, CA (distinguished in *Re De Linden, Re Spurrier's Settlement, De Hayn v Garland* [1897] 1 Ch 453). As to the power of the Court of Protection to vest stock in a curator outside the jurisdiction see PARA 725 post.

3 *Re S (No 2) (Hospital Patient: Foreign Curator)* [1995] 4 All ER 30, [1996] 1 FCR 128.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(6) LITIGATION/638. Procedure.

638. Procedure.

A claim form which would otherwise be served on a patient¹ must be served on the person authorised under the Mental Health Act 1983² to conduct proceedings in the name of the patient or on his behalf, or, if there is no person so authorised, the person with whom the patient resides or in whose care the patient is³. In the case of an application for an order appointing a litigation friend⁴ where a patient has no litigation friend⁵, service must be on every person on whom the claim form should be served, namely the above person authorised to conduct proceedings and the person with whom patient resides or in whose care the patient is⁶. In the case of any other document, service must be made on the litigation friend who is conducting proceedings on behalf of the patient⁷. The court may make an order permitting a document to be served on the patient, or some person other than the person specified above⁸. The court may also order that, although a document has been served on someone other than the person specified above, the document is to be treated as if it had been properly served⁹.

Where the defendant makes certain admissions¹⁰, the claimant has a right to enter judgment except where the defendant is a patient or, in the case of some of those admissions¹¹, where the claimant is a patient¹².

1 For the meaning of 'patient' see PARA 634 note 1 ante.

2 Ie under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed): see PARA 681 post.

3 CPR 6.6(1). Service on the medical officer of the institution in which the defendant was resident was allowed in relation to a corresponding previous rule (*Raine v Wilson* (1873) LR 16 Eq 576); and that was the proper practice where the defendant was detained in an institution (*Fore Street Warehouse Co Ltd v Durrant & Co* (1883) 10 QBD 471, DC; *Robinson v Galland* (1889) 5 TLR 504 at 505), and the keeper of an institution who refuses to allow service is liable to committal (*Denison v Hardings* [1867] WN 17). Service on the defendant's business manager is insufficient: *Fore Street Warehouse Co Ltd v Durrant & Co* supra.

4 As to the litigation friend see PARA 634 ante.

5 Ie an application under CPR 21.8: see PARA 636 ante.

6 CPR 6.6(1), CPR 21.8(1).

7 CPR 6.6(1).

8 CPR 6.6(2). The reference in the text is a reference to the person specified in CPR 6.6(1). Such an application may be made without notice: CPR 6.6(3).

9 CPR 6.6(4). If documents are served on the patient as if he were not a patient the proceedings against him are technically invalid: *Cutbush v Cutbush* (1893) 37 Sol Jo 685 (a decision in regard to an earlier version of the rules).

10 The admissions are: admission of the whole of a claim for a specified amount of money (under CPR 14.4); admission of part of a claim for a specified amount of money (under CPR 14.5); admission of liability to pay the whole of a claim for an unspecified amount of money (under CPR 14.6); and admission of liability to pay a claim for an unspecified amount of money where the defendant offers a sum in satisfaction of the claim (under CPR 14.7).

11 Ie the admissions under CPR 14.5 and CPR 14.7.

12 CPR 14.1(4).

UPDATE

638 Procedure

TEXT AND NOTES 1, 12--References to patient are now to protected party: CPR 6.6(1), CPR 14.1(4) (both amended by SI 2007/2204).

TEXT AND NOTES 1-9--CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(6) LITIGATION/639. Recovery on behalf of a patient.

639. Recovery on behalf of a patient.

Where a claim is made by or on behalf of a patient¹ or against a patient, no settlement, compromise or payment, and no acceptance of money paid into court is valid, so far as it relates to the claim by, on behalf of or against the patient, without the approval of the court².

In any proceedings where: (1) money is recovered by or on behalf of or for the benefit of, a patient³; or (2) money paid into court is accepted by or on behalf of a patient⁴, the money must be dealt with in accordance with directions given by the court and not otherwise⁵, which may provide that the money be wholly or partly paid into court and invested or otherwise dealt with there⁶.

¹ For the meaning of 'patient' see PARA 634 note 1 ante.

² CPR 21.10(1). Where before proceedings in which a claim is made by or on behalf of, or against a patient (whether alone or with any other person) are begun, an agreement is reached for the settlement of the claim and the sole purpose of the proceedings on that claim is to obtain the approval of the court to a settlement or compromise of the claim, the claim must be made using the alternative procedure for claims (see CPR Pt 8) and must include a request to the court for approval of the settlement or compromise: CPR 21.10(2). In proceedings relating to fixed recoverable costs in road traffic accidents (see CPR Pt 45 Section II), the court must not make an order for detailed assessment of costs payable to the patient but must assess the costs in the manner set out in CPR Pt 45 Section II: CPR 21.10(3). For provisions where money is payable to a patient see CPR 48.5. See also *Practice Direction--Children and Patients* PD 21 para 6.1 et seq.

As to the procedure where a patient is a party to a claim in which the parties apply to the Court of Appeal for an appeal or application to be allowed by consent see *Practice Direction--Appeals* (2000) PD 52 paras 12, 13 (para 13 as amended).

A compromise agreement may be withdrawn prior to formal approval by the court even if made or accepted by reference to CPR Pt 36: *Drinkall v Whitwood* [2003] EWCA Civ 1547, [2004] 4 All ER 378. As to the need for any hearing to be in private and the provision of counsel's opinion in advance see *Beatham v Carlisle Hospitals NHS Trusts* (1999) Times, 20 May. See also CPR 39.2(3)(d). The aim is to ensure that there is adequate compensation for the claimant and that his interests are properly protected: see *Black v Yates* [1992] QB 526, [1991] 4 All ER 722.

³ CPR 21.11(1)(a).

⁴ CPR 21.11(1)(b).

⁵ CPR 21.11(1). See CPR 21.11; and CIVIL PROCEDURE vol 11 (2009) PARA 73. As to the apportionment between entitled persons of money recovered under the Fatal Accidents Act 1976 see *Practice Direction--Children and Patients* PD 21 paras 7.1-7.3.

⁶ CPR 21.11(2). Such directions may include: that the money be paid into the High Court for investment; that certain sums be paid direct to the patient, his litigation friend (see PARA 634 ante) or his legal representative for the immediate benefit of the patient or for expenses incurred on his behalf; and that the applications in respect of the investment of the money be transferred to a local district registry: see *Practice Direction--Children and Patients* PD 21 para 8.1 et seq.

It is important for the High Court to avoid exercising these powers in a way which encroaches upon the jurisdiction of the Court of Protection, which has far more extensive powers in respect of the property and affairs of patients: see PARA 682 et seq post.

Where the sum to be administered is over £30,000, the order approving the settlement will contain a direction to the litigation friend to apply to the Court of Protection for the appointment of a receiver (see PARA 704 post), after which the fund will be transferred to the Court of Protection; where the sum to be administered is under £20,000, it may be retained in court and dealt with as if the patient were a child; and in intermediate cases the advice of the master of the Court of Protection should be sought. As to investment on behalf of a patient generally see *Practice Direction--Children and Patients* PD 21 paras 11.1-11.7. In relation to a child who is also a

patient, and likely to remain so on reaching full age, the relevant fund should be treated as a patient's fund: see *Practice Direction--Children and Patients* PD 21 para 8.3.

UPDATE

639 Recovery on behalf of a [protected party]

TEXT AND NOTES--References to patient are now to protected party: CPR 48.5 amended, CPR Pt 21 substituted, by SI 2007/2204.

NOTE 2--CPR 21.10(3) amended: SI 2010/621.

TEXT AND NOTES 3-6--A litigation friend who incurs expenses on behalf of a protected party in any proceedings is entitled to recover the amount paid or payable out of any money recovered or paid into court to the extent that it has been reasonably incurred and is reasonable in amount: see CPR 21.12 (CPR Pt 21 as substituted: see TEXT AND NOTES).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(6) LITIGATION/640. Enforcement against a patient.

640. Enforcement against a patient.

If judgment is obtained against a defendant under a mental disability, a stay of execution may be granted¹ to enable an application to be made by the receiver of the income to the Court of Protection for leave to pay the amount of the judgment debt out of the patient's estate².

When a charging order is obtained under the general enactments relating to execution³ against the property of a mentally disordered person, the court has no power to make an order providing that the amount to be charged is to be determined by the master of the Court of Protection, for the judgment creditor is entitled to an unconditional order⁴. Mental incapacity is no bar to being made bankrupt⁵.

Although disability is in itself not a bar to the granting of an injunction or the enforcing of an order made, if a person against whom an injunction is being sought is incapable of understanding what he is doing or that it is wrong, an injunction ought not to be granted against him, because he would not be capable of complying with it, it would have no deterrent effect, and he would have a clear defence to an application for committal for contempt⁶.

1 *Burt v Blackburn* (1887) 3 TLR 356, CA. For the position of creditors as against the property of a mentally disordered person, when such property comes under the control of the Court of Protection, see PARA 686 post.

2 *Ames v Parkinson* (1847) 2 Ph 388. For the meaning of 'patient' see PARA 634 note 1 ante.

3 See generally CIVIL PROCEDURE vol 12 (2009) PARAS 1242, 1467 et seq. Cf the power to make charging orders under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed): see s 96(1)(b); and PARA 691 post. See also CPR 12.10, 12.11; *Practice Direction--Default Judgment* PD 12; CPR 14.1(4); CPR Pt 23.

4 See *Horne v Pountain* (1889) 23 QBD 264; but see note 1 supra.

5 See PARA 700 post; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 10, 815.

6 See *Wookey v Wookey, Re S (A Minor)* [1991] Fam 121, [1991] 3 All ER 365, CA (non-molestation injunction under the Domestic Violence and Matrimonial Proceedings Act 1976). See also *P v P (Contempt of Court: Mental Capacity)* [1999] 2 FLR 897, CA; *Harris v Harris* (22 April 1999) Lexis, CA. As to non-molestation orders see now the Family Law Act 1996 s 42 (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 716 et seq.

UPDATE

640 Enforcement against a [protected party]

TEXT AND NOTE 2--Reference to the patient's estate is now to the protected party's estate: see NOTE 3.

NOTE 3--CPR 12.10, 12.11 amended (to refer to protected party): SI 2007/2204.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(7) PERSONS WHO LACK CAPACITY UNDER THE MENTAL CAPACITY ACT 2005/(i) In general/641. The principles.

(7) PERSONS WHO LACK CAPACITY UNDER THE

(i) In general

641. The principles.

As from a day to be appointed¹, the following principles apply for the purposes of the Mental Capacity Act 2005²:

- 101 (1) a person must be assumed to have capacity unless it is established that he lacks capacity³;
- 102 (2) a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success⁴;
- 103 (3) a person is not to be treated as unable to make a decision merely because he makes an unwise decision⁵;
- 104 (4) an act done, or decision made, under the Mental Capacity Act 2005 for or on behalf of a person who lacks capacity must be done, or made, in his best interests⁶; and
- 105 (5) before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action⁷.

¹ At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

² Ibid s 1(1). The approach in the Mental Capacity Act 2005 reflects the common law approach (see PARA 612 ante) except for the lack of a requirement that the person believe the information provided (see also note 3 infra). The courts are likely to turn to the existing common law when interpreting and applying these provisions. For the general defence to 'section 5 acts' see PARA 644 post.

³ Ibid s 1(2). For these purposes, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain: s 2(1). It does not matter whether the impairment or disturbance is permanent or temporary: s 2(2). A lack of capacity cannot be established merely by reference to: (1) a person's age or appearance; or (2) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity: s 2(3). In proceedings under the Mental Capacity Act 2005 or any other enactment, any question whether a person lacks capacity within the meaning of the Act must be decided on the balance of probabilities: s 2(4). No power which a person ('D') may exercise under the Mental Capacity Act 2005 in relation to a person who lacks capacity or where D reasonably thinks that a person lacks capacity, is exercisable in relation to a person under 16: s 2(5). Section 2(5) is subject to s 18(3) (see PARA 759 post): s 2(6). 'Enactment' includes a provision of subordinate legislation: s 64(1). As to subordinate legislation generally see PARA 406 note 68 ante.

For these purposes, a person is unable to make a decision for himself if he is unable: (a) to understand the information relevant to the decision; (b) to retain that information; (c) to use or weigh that information as part of the process of making the decision; or (d) to communicate his decision (whether by talking, using sign language or any other means): s 3(1). A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means): s 3(2). The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision: s 3(3). The information relevant to a decision includes information about the reasonably foreseeable consequences of: (i) deciding one way or another; or (ii) failing to make the decision: s 3(4).

4 Ibid s 1(3). As to inability to make decisions see note 3 supra.

5 Ibid s 1(4).

6 Ibid s 1(5). As to 'best interests' see PARA 642 post.

7 Ibid s 1(6).

UPDATE

641-644 In general

A person who lacks capacity to consent to arrangements proposed for his care in a care home or hospital may be deprived of his liberty where authorisation under the Mental Capacity Act 2005 s 4A, Sch A1 exists: see PARA 641A.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(7) PERSONS WHO LACK CAPACITY UNDER THE MENTAL CAPACITY ACT 2005/(i) In general/641A. Restrictions on deprivation of liberty.

641A. Restrictions on deprivation of liberty.

A person may be deprived of his liberty in a hospital or care home only if a standard or urgent authorisation is in force or if it is a consequence of giving effect to an order of the Court of Protection on a personal welfare matter: see Mental Capacity Act 2005 s 4A (ss 4A, 4B added by Mental Health Act 2007 s 50(2)). See *W Primary Care Trust v TB* [2009] EWHC 1737 (Fam), [2010] 2 All ER 331. If there is a question about whether he may be lawfully deprived of his liberty and the deprivation is to enable life sustaining treatment or treatment believed necessary to prevent a serious deterioration in his condition, the person may be detained while a decision is sought from the Court of Protection: Mental Capacity Act 2005 s 4B. As to the procedures and requirements relating to such standard and urgent authorisations see Sch A1 (added by Mental Health Act 2007 s 50(5), Sch 7); Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008, SI 2008/1858 (amended by SI 2009/827); Mental Capacity (Deprivation of Liberty: Monitoring and Reporting; and Assessments--Amendment) Regulations 2009, SI 2009/827, regs 2-5; Mental Capacity (Deprivation of Liberty: Assessments, Standard Authorisations and Disputes about Residence) (Wales) Regulations 2009, SI 2009/783.

As to the powers of the court where a standard or urgent authorisation has been given under the Mental Capacity Act 2005 Sch A1 see s 21A (added by Mental Health Act 2007 Sch 9 para 2).

A representative to a person in respect of whom a standard authorisation has been issued must be appointed to maintain contact with the person and to support and represent him in matters relating to his deprivation of liberty: see Mental Capacity Act 2005 Sch A1 Pt 10 (paras 137-153); Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008, SI 2008/1315 (amended by SI 2008/2368); Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) (Wales) Regulations 2009, SI 2009/266.

If a person is ineligible to be deprived of liberty by the Mental Capacity Act 2005 (see Sch 1A) (added by Mental Health Act 2007 Sch 8), the court may not include in a welfare order provision which authorises him to be deprived of his liberty: Mental Capacity Act 2005 s 16A (added by Mental Health Act 2007 s 50(3)).

An independent mental capacity advocate must be instructed if a person ('P') becomes subject to Sch A1 and the managing authority of the relevant hospital or care home is satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate to consult in determining what would be in P's best interests: see Mental Capacity Act 2005 ss 39A, 39B (ss 39A-39E added by Mental Health Act 2007 Sch 9 para 6). As to the duty to appoint an independent mental capacity advocate in respect of a person unrepresented while subject to the Mental Capacity Act 2005 Sch A1 see s 39C; as to the duty to instruct an independent mental capacity advocate where a person is subject to Sch A1 without a paid representative see s 39D; and as to the limitations on the duty under s 39D see s 39E.

UPDATE

641-644 In general

A person who lacks capacity to consent to arrangements proposed for his care in a care home or hospital may be deprived of his liberty where authorisation under the Mental Capacity Act 2005 s 4A, Sch A1 exists: see PARA 641A.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(7) PERSONS WHO LACK CAPACITY UNDER THE MENTAL CAPACITY ACT 2005/(i) In general/642. Best interests.

642. Best interests.

As from a day to be appointed¹, in determining for the purposes of the Mental Capacity Act 2005 what is in a person's best interests, the person making the determination must not make it merely on the basis of the person's age or appearance, or a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests².

The person making the determination must consider all the relevant circumstances³ and, in particular, take the following steps⁴:

- 106 (1) he must consider: (a) whether it is likely that the person will at some time have capacity⁵ in relation to the matter in question⁶; and (b) if it appears likely that he will, when that is likely to be⁷;
- 107 (2) he must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him⁸;
- 108 (3) where the determination relates to life-sustaining treatment⁹ he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death¹⁰;
- 109 (4) he must consider, so far as is reasonably ascertainable: (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity)¹¹; (b) the beliefs and values that would be likely to influence his decision if he had capacity¹²; and (c) the other factors that he would be likely to consider if he were able to do so¹³;
- 110 (5) he must take into account, if it is practicable and appropriate to consult them, the views of:
 - 5 11. (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind¹⁴;
 12. (b) anyone engaged in caring for the person or interested in his welfare¹⁵;
 13. (c) any donee of a lasting power of attorney¹⁶ granted by the person¹⁷; and
 14. (d) any deputy¹⁸ appointed for the person by the Court of Protection¹⁹,
- 6 111 as to what would be in the person's best interests and, in particular, as to the matters mentioned in head (4) above²⁰.

The above duties²¹ also apply in relation to the exercise of any powers which: (i) are exercisable under a lasting power of attorney²²; or (ii) are exercisable by a person under the Mental Capacity Act 2005 where he reasonably believes that another person lacks capacity²³.

In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with the above requirements²⁴ if²⁵ he reasonably believes that what he does or decides is in the best interests of the person concerned²⁶.

¹ At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 Ibid s 4(1).

3 'Relevant circumstances' are those of which the person making the determination is aware, and which it would be reasonable to regard as relevant: *ibid* s 4(11).

4 Ibid s 4(2). This checklist is a departure from the common law (see PARA 613 ante) but builds on it; it is not exhaustive, and there is no real definition of 'best interests'.

For the general defence to 'section 5 acts see PARA 644 post.

5 As to issues of capacity see PARA 641 note 3 ante.

6 Mental Capacity Act 2005 s 4(3)(a).

7 Ibid s 4(3)(b).

8 Ibid s 4(4). As to making decisions see PARA 641 note 3 ante.

9 'Life-sustaining treatment' means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life: *ibid* ss 4(10), 64(1). 'Treatment' includes a diagnostic or other procedure: s 64(1).

10 Ibid s 4(5).

11 Ibid s 4(6)(a).

12 Ibid s 4(6)(b).

13 Ibid s 4(6)(c).

14 Ibid s 4(7)(a).

15 Ibid s 4(7)(b).

16 'Lasting power of attorney' has the meaning given in *ibid* s 9 (see PARA 648 post): s 64(1).

17 Ibid s 4(7)(c).

18 'Deputy' has the meaning given in *ibid* s 16(2)(b) (see PARA 757 post): s 64(1).

19 Ibid s 4(7)(d). As to the Court of Protection see PARA 750 post.

20 Ibid s 4(7).

21 *Ie* the duties imposed by *ibid* s 4(1)-(7).

22 Ibid s 4(8)(a).

23 Ibid s 4(8)(b).

24 *Ie* with *ibid* s 4.

25 *Ie* having complied with the requirements of *ibid* s 4(1)-(7).

26 Ibid s 4(9).

UPDATE

641-644 In general

A person who lacks capacity to consent to arrangements proposed for his care in a care home or hospital may be deprived of his liberty where authorisation under the Mental Capacity Act 2005 s 4A, Sch A1 exists: see PARA 641A.

642 Best interests

TEXT AND NOTES--Where it is in the best interests of a person lacking mental capacity to be deprived of liberty in order to prevent harm to themselves, autonomy does not trump welfare: *Dorset CC v EH* [2009] EWHC 784 (Fam), [2009] All ER (D) 166 (Apr) (necessary for patient to be deprived of liberty to prevent harm to herself).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(7) PERSONS WHO LACK CAPACITY UNDER THE MENTAL CAPACITY ACT 2005/(i) In general/643. Payment for necessary goods and services.

643. Payment for necessary goods and services.

As from a day to be appointed¹, if necessary² goods or services are supplied to a person who lacks capacity³ to contract for the supply, he must pay a reasonable price for them⁴.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 'Necessary' means suitable to a person's condition in life and to his actual requirements at the time when the goods or services are supplied: *ibid* s 7(2).

3 As to lack of capacity see PARA 641 note 3 ante.

4 Mental Capacity Act 2005 s 7(1). This effectively revises the rule in the Sale of Goods Act 1979 s 3(2) (prospectively amended): see PARA 604 ante; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 37.

UPDATE

641-644 In general

A person who lacks capacity to consent to arrangements proposed for his care in a care home or hospital may be deprived of his liberty where authorisation under the Mental Capacity Act 2005 s 4A, Sch A1 exists: see PARA 641A.

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644. Protection for persons acting in connection with care or treatment of another person.

As from a day to be appointed¹, if a person ('D') does an act in connection with the care or treatment² of another person ('P'), and: (1) before doing the act, D takes reasonable steps to establish whether P lacks capacity³ in relation to the matter in question⁴; and (2) when doing the act, D reasonably believes that P lacks capacity in relation to the matter, and that it will be in P's best interests⁵ for the act to be done⁶, then in those circumstances D does not incur any liability in relation to the act that he would not have incurred if P: (a) had had capacity to consent in relation to the matter⁷; and (b) had consented to D's doing the act⁸.

If D does an act that is intended to restrain P⁹, it is not an act such as is referred to above¹⁰ unless two further conditions are satisfied¹¹:

- 112 (i) D reasonably believes that it is necessary to do the act in order to prevent harm to P¹²; and
- 113 (ii) the act is a proportionate response to the likelihood of P's suffering harm, and the seriousness of that harm¹³.

The provisions in heads (1), (2), (a) and (b) above¹⁴ do not authorise a person to do an act which conflicts with a decision made, within the scope of his authority and in accordance with Part 1 of the Mental Capacity Act 2005¹⁵, by a donee of a lasting power of attorney¹⁶ granted by P, or a deputy¹⁷ appointed for P by the Court of Protection¹⁸. However, this does not stop a person providing life-sustaining treatment¹⁹, or doing any act which he reasonably believes to be necessary to prevent a serious deterioration in P's condition, while a decision as respects any relevant issue is sought from the court²⁰.

If an act to which heads (1), (2), (a) and (b) above²¹ apply involves expenditure, it is lawful for D to pledge P's credit for the purpose of the expenditure, and to apply money in P's possession for meeting the expenditure²². If the expenditure is borne for P by D, it is lawful for D to reimburse himself out of money in P's possession, or to be otherwise indemnified by P²³.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 As to the meaning of 'treatment' see PARA 642 note 9 ante.

3 As to lack of capacity see PARA 641 note 3 ante.

4 Mental Capacity Act 2005 s 5(1)(a). Nothing in s 5 excludes a person's civil liability for loss or damage, or his criminal liability, resulting from his negligence in doing the act: s 5(3). Nothing in s 5 affects the operation of ss 24-26 (advance decisions to refuse treatment: see PARA 652 et seq post): s 5(4).

5 As to best interests see PARA 642 ante.

6 Mental Capacity Act 2005 s 5(1)(b).

7 Ibid s 5(2)(a).

8 Ibid s 5(2)(b).

9 For these purposes, D restrains P if he: (1) uses, or threatens to use, force to secure the doing of an act which P resists; or (2) restricts P's liberty of movement, whether or not P resists: *ibid* s 6(4). However, D does more than merely restrain P if he deprives P of his liberty within the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 5(1) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 127 et seq), whether or not D is a public authority: Mental Capacity Act 2005 s 6(5). As to when a deprivation of liberty arises under the Convention for the Protection of Human Rights and Fundamental Freedoms art 5 see *Guzzardi v Italy* (1980) 3 EHRR 333; *Ashingdane v United Kingdom* (1985) 7 EHRR 528, ECtHR; *HL v United Kingdom (Application 45508/99)* (2004) 81 BMLR 131, (2004) Times, 19 October, ECtHR. See also PARA 437 note 7 ante.

10 Is an act to which the Mental Capacity Act 2005 s 5 applies. Such acts are sometimes referred to as 'section 5 acts'.

11 Ibid s 6(1).

12 Ibid s 6(2).

13 Ibid s 6(3).

14 *Ie* *ibid* s 5.

15 *Ie* *ibid* Pt 1 (ss 1-44).

16 For the meaning of 'lasting power of attorney' see PARA 642 note 16 ante. See also PARA 647 et seq post.

17 For the meaning of 'deputy' see PARA 642 note 18 ante.

18 Mental Capacity Act 2005 s 6(6). As to the Court of Protection see PARA 750 post.

19 For the meaning of 'life-sustaining treatment' see PARA 642 note 9 ante.

20 Mental Capacity Act 2005 s 6(7).

21 See note 14 *supra*.

22 Mental Capacity Act 2005 s 8(1). Section 8(1), (2) does not affect any power under which (apart from those provisions) a person: (1) has lawful control of P's money or other property; and (2) has power to spend money for P's benefit: s 8(3).

23 Ibid s 8(2). See note 22 *supra*.

UPDATE

641-644 In general

A person who lacks capacity to consent to arrangements proposed for his care in a care home or hospital may be deprived of his liberty where authorisation under the Mental Capacity Act 2005 s 4A, Sch A1 exists: see PARA 641A.

644 Protection for persons acting in connection with care or treatment of another person

NOTE 9--Mental Capacity Act 2005 s 6(5) repealed: Mental Health Act 2007 s 50(4)(a), Sch 11 Pt 10.

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(ii) Codes of Practice

645. Codes of practice issued by the Lord Chancellor.

As from a day to be appointed¹, the Lord Chancellor² must prepare and issue one or more codes of practice:

- 114 (1) for the guidance of persons assessing whether a person has capacity³ in relation to any matter⁴;
- 115 (2) for the guidance of persons acting in connection with the care or treatment of another person⁵;
- 116 (3) for the guidance of donees of lasting powers of attorney⁶;
- 117 (4) for the guidance of deputies⁷ appointed by the Court of Protection⁸;
- 118 (5) for the guidance of persons carrying out research in reliance on any provision made by or under the Mental Capacity Act 2005⁹;
- 119 (6) for the guidance of independent mental capacity advocates¹⁰;
- 120 (7) with respect to the provisions on advance decisions and apparent advance decisions¹¹; and
- 121 (8) with respect to such other matters concerned with the Mental Capacity Act 2005 as he thinks fit¹².

The Lord Chancellor may from time to time revise a code¹³. He may also delegate the preparation or revision of the whole or any part of a code so far as he considers expedient¹⁴.

It is the duty of a person to have regard to any relevant code if he is acting in relation to a person who lacks capacity¹⁵ and is doing so in one or more of the following ways: (a) as the donee of a lasting power of attorney¹⁶; (b) as a deputy appointed by the court¹⁷; (c) as a person carrying out research in reliance on any provision made by or under the Mental Capacity Act 2005¹⁸; (d) as an independent mental capacity advocate¹⁹; (e) in a professional capacity²⁰; (f) for remuneration²¹.

If it appears to a court or tribunal conducting any criminal or civil proceedings that a provision of a code or a failure to comply with a code is relevant to a question arising in the proceedings, the provision or failure must be taken into account in deciding the question²².

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

3 As to capacity see PARA 641 note 3 ante.

4 Mental Capacity Act 2005 s 42(1)(a). As to the code of practice under the Mental Health Act 1983 see PARA 436 ante.

5 Mental Capacity Act 2005 s 42(1)(b). As to such care and treatment see s 5; and PARA 644 ante.

6 Ibid s 42(1)(c). For the meaning of 'lasting power of attorney' see PARA 642 note 16 ante. See also PARA 647 et seq post.

7 For the meaning of 'deputy' see PARA 642 note 16 ante.

8 Mental Capacity Act 2005 s 42(1)(d). As to the Court of Protection generally see PARA 750 ante. A code under s 42(1)(d) may contain separate guidance for deputies appointed by virtue of Sch 5 para 1(2) (functions of deputy conferred on receiver appointed under the Mental Health Act 1983: see PARA 406 note 67 ante): Mental Capacity Act 2005 s 42(6).

9 Ibid s 42(1)(e). As to such research see, in particular, ss 30-34; and PARAS 659-662 post.

10 Ibid s 42(1)(f). As to independent mental capacity advocates see PARA 664 post.

11 Ibid s 42(1)(g). As to advance decisions and apparent advance decisions see ss 24-26; and PARAS 652-655 post.

12 Ibid s 42(1)(h).

13 Ibid s 42(2). For the purposes of ss 42, 43, 'code' means a code prepared or revised under s 42: s 42(7).

14 Ibid s 42(3).

15 As to lack of capacity see PARA 641 note 3 ante.

16 Mental Capacity Act 2005 s 42(4)(a).

17 Ibid s 42(4)(b).

18 Ibid s 42(4)(c). As to such provisions see ss 30-34; and PARAS 659-662 post.

19 Ibid s 42(4)(d).

20 Ibid s 42(4)(e).

21 Ibid s 42(4)(f).

22 Ibid s 42(5). It is necessary to take account of such a code unless there are cogent reasons for departing from it (it is guidance and not instruction but it is more than mere advice), especially where a person's human rights are at stake; failure to do so could give rise to remedies including damages in public law: see *R (on the application of Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, [2005] All ER (D) 139 (Oct) (a case concerning a code under the Mental Health Act 1983 s 118 (as amended): see PARA 436 ante).

UPDATE

645 Codes of practice issued by the Lord Chancellor

TEXT AND NOTES--A Code of Practice was issued in April 2007 and is available from the Public Guardianship Office.

TEXT AND NOTES 1-12--Also, heads (9) for the guidance of persons exercising functions under the Mental Capacity Act 2005 Sch A1 (see PARA 641A); (10) for the guidance of representatives appointed under Sch A1 Pt 10 (paras 137-153): s 42(1)(fa), (fb) (added by Mental Health Act 2007 Sch 9 para 8(2)).

TEXT AND NOTES 15-21--Also, heads (g) in the exercise of functions under the Mental Capacity Act 2005 Sch A1; (h) as a representative appointed under Sch A1 Pt 10: s 42(4)(da), (db) (added by Mental Health Act 2007 Sch 9 para 8(3)).

NOTE 22--*Munjaz*, cited, reported at [2006] 2 AC 148.

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646. Procedure for codes of practice.

As from a day to be appointed¹, before preparing or revising a code², the Lord Chancellor³ must consult: (1) the National Assembly for Wales⁴; and (2) such other persons as he considers appropriate⁵.

The Lord Chancellor may not issue a code unless: (a) a draft of the code has been laid by him before both Houses of Parliament⁶; and (b) a 40 day period⁷ has elapsed without either House resolving not to approve the draft⁸.

The Lord Chancellor must arrange for any code that he has issued to be published in such a way as he considers appropriate for bringing it to the attention of persons likely to be concerned with its provisions⁹.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 For the meaning of 'code' see PARA 645 note 13 ante.

3 As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

4 Mental Capacity Act 2005 s 43(1)(a). As to the National Assembly for Wales see PARA 411 ante; and CONSTITUTIONAL LAW AND HUMAN RIGHTS.

5 Ibid s 43(1)(b).

6 Ibid s 43(2)(a). As to Parliament see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 201 et seq; PARLIAMENT vol 78 (2010) PARA 1 et seq.

7 A '40 day period', in relation to the draft of a proposed code, means: (1) if the draft is laid before one House of Parliament on a day later than the day on which it is laid before the other House, the period of 40 days beginning with the later of the two days; (2) in any other case, the period of 40 days beginning with the day on which it is laid before each House: *ibid* s 43(4). In calculating the period of 40 days, no account is to be taken of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days: s 43(5).

8 Ibid s 43(2)(b).

9 Ibid s 43(3).

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(iii) Lasting Powers of Attorney

647. In general.

As from a day to be appointed¹, the Mental Capacity Act 2005² introduces a new and expanded statutory form of power of attorney, the 'lasting power of attorney', to replace the enduring power of attorney under the Enduring Powers of Attorney Act 1985³.

¹ At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

² See *ibid* ss 9-14, 22-23, Sch 1; paras 648-651, 673 post; and AGENCY vol 1 (2008) PARA 217 et seq.

³ See the Enduring Powers of Attorney Act 1985 (prospectively repealed); and AGENCY vol 1 (2008) PARA 194 et seq. No enduring power of attorney within the meaning of the Enduring Powers of Attorney 2005 is to be created after the commencement of the Mental Capacity Act 2005 s 66(1)(b): s 66(2). Although the Enduring Powers of Attorney Act 1985 ceases to have effect and is repealed by the Mental Capacity Act 2005 ss 66(1)(b), 67(2), Sch 7 from a day to be appointed, the legal effect of an enduring power of attorney already made is preserved and integrated into the scheme of the new legislation: see s 66(1)(b), (3), Sch 4; and AGENCY vol 1 (2008) PARA 194. There are also transitional provisions in connection with the repeal of the Enduring Powers of Attorney Act 1985: see the Mental Capacity Act 2005 s 66(4), Sch 5 Pt 2; and AGENCY vol 1 (2008) PARA 194. See also PARA 406 note 67 ante.

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648. Lasting power of attorney and donees.

As from a day to be appointed¹, a lasting power of attorney is a power of attorney under which the donor ('P') confers on the donee (or donees) authority to make decisions about all or any of the following:

- 122 (1) P's personal welfare or specified matters concerning P's personal welfare; and
- 123 (2) P's property² and affairs or specified matters concerning P's property and affairs,

and which includes authority to make such decisions³ in circumstances where P no longer has capacity⁴. There are a number of important qualifications in regard to a lasting power of attorney⁵.

A donee of a lasting power of attorney must be an individual who has reached 18, or if the power relates only to P's property and affairs, either such an individual or a trust corporation⁶. An individual who is bankrupt may not be appointed as donee of a lasting power of attorney in relation to P's property and affairs⁷. There are specific provisions applying in relation to an instrument under which two or more persons are to act as donees of a lasting power of attorney⁸. An instrument used to create a lasting power of attorney cannot give the donee (or, if more than one, any of them) power to appoint a substitute or successor, but may itself appoint a person to replace the donee (or, if more than one, any of them) on the occurrence of certain events⁹ having the effect of terminating the donee's appointment¹⁰.

There are restrictions placed on the use of restraint by attorneys, matching those applying in relation to 'section 5 acts'¹¹ and deputies¹²; restraint can only be used to prevent harm to P, and must be proportionate¹³.

An attorney cannot act where P has capacity¹⁴, nor where P has made a qualifying advance decision¹⁵.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 'Property' includes any thing in action and any interest in real or personal property: *ibid* s 64(1).

3 In the Mental Capacity Act 2005, references to making decisions, in relation to a donee of a lasting power of attorney or a deputy appointed by the Court of Protection, include where appropriate, acting on decisions made: s 64(2). For the meaning of 'deputy' see PARA 642 note 18 ante. As to the Court of Protection see PARA 750 post. As to decision-making powers of the Court of Protection and court-appointed deputies regarding personal welfare and property and affairs see PARAS 749-760 post.

4 See *ibid* s 9(1); and AGENCY vol 1 (2008) PARA 217. As to the role of the Public Guardian see PARAS 761-762 post.

5 The donor must be aged 18 or over and have capacity to execute a lasting power of attorney, and the rules about who can be a donee in *ibid* s 10 (see the text to notes 6-8 *infra*) must be complied with, as must the detailed provisions about the making and registration of the instrument: see s 9(2), Sch 1. As the formalities in relation to lasting powers of attorney including making instruments, registration, cancellation of registration, notification of severance, and records of alterations in registered powers see Sch 1; and AGENCY vol 1 (2008) PARA 219 et seq. If the rules referred to in s 9(2) are not complied with, the document created will not be a valid lasting power of attorney and cannot lawfully be used to make decisions on behalf of the donor: see s 9(3). The

authority conferred is subject to the principles in s 1 (see PARA 641 ante), the best interests requirements in s 4 (see PARA 642 ante), and any conditions or restrictions specified in the instrument: see s 9(4). See AGENCY vol 1 (2008) PARA 217.

6 See *ibid* s 10(1); and AGENCY vol 1 (2008) PARA 218. 'Trust corporation' has the meaning given in the Trustee Act 1925 s 68(1) (see TRUSTS vol 48 (2007 Reissue) PARA 798); Mental Capacity Act 2005 s 64(1). See AGENCY vol 1 (2008) PARA 217.

7 See *ibid* s 10(2); and AGENCY vol 1 (2008) PARA 218. As to the bankruptcy of individuals generally see BANKRUPTCY AND INDIVIDUAL INSOLVENCY.

8 See *ibid* s 10(3)-(7); and AGENCY vol 1 (2008) PARA 218. The appointment may specify that they act jointly, jointly and severally, or jointly in respect of some matters and jointly and severally in respect of others (see s 10(4)) but in the absence of specification the assumption is that they act jointly (see s 10(5)). The provisions also cover the implications for breach of any relevant rules, in particular those contained in Sch 1.

9 In any events mentioned in *ibid* s 13(6)(a)-(d): see PARA 650 note 5 post.

10 See *ibid* s 10(8)' and AGENCY vol 1 (2008) PARA 218.

11 See *ibid* s 6; and PARA 644 ante.

12 See *ibid* s 20; and PARA 760 post.

13 See *ibid* s 11(1)-(6); and AGENCY vol 1 (2008) PARA 217.

14 As to issues of capacity see PARA 641 note 3 ante.

15 See the Mental Capacity Act 2005 s 11(7)(a), (b); and AGENCY vol 1 (2008) PARA 217. As to qualifying advance decisions see ss 24-26; and PARA 652 et seq post. Although an attorney may give or refuse consent to the carrying out or continuation of health care, this does not extend to refusing life-sustaining treatment unless the lasting power of attorney expressly said so, and is subject to any conditions or restrictions in the lasting power of attorney: see s 11(7)(c), (8); and AGENCY vol 1 (2008) PARA 217.

UPDATE

648 Lasting power of attorney and donees

NOTE 13--Mental Capacity Act 2005 s 11(6) repealed: Mental Health Act 2007 s 50(4)(b), Sch 11 Pt 10.

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649. Scope of lasting powers of attorney in relation to gifts.

As from a day to be appointed¹, provision is made in relation to an attorney's power to make gifts of the donor's property².

Where a lasting power of attorney confers authority to make decisions about P's property and affairs, it does not authorise a donee (or, if more than one, any of them) to dispose of the donor's property by making gifts except as permitted by the following provisions³. The donee may make gifts: (1) on customary occasions⁴ to persons (including himself) who are related to or connected with the donor; or (2) to any charity to whom the donor made or might have been expected to make gifts, if the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate⁵.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 See *ibid* s 12; and AGENCY vol 1 (2008) PARA 217. This provision is similar to the Enduring Powers of Attorney Act 1985 s 3(5) (prospectively amended and repealed): see AGENCY vol 1 (2008) PARA 217. As to the meaning of 'property' see PARA 648 note 2 ante.

3 See the Mental Capacity Act 2005 s 12(1); and AGENCY vol 1 (2008) PARA 217.

4 'Customary occasion' means: (1) the occasion or anniversary of a birth, a marriage or the formation of a civil partnership; or (2) any other occasion on which presents are customarily given within families or among friends or associates: *ibid* s 12(3).

5 *Ibid* s 12(2). This is subject to any conditions or restrictions in the instrument: s 12(4). See AGENCY vol 1 (2008) PARA 217.

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650. Revocation of lasting powers of attorney.

As from a day to be appointed¹, if a donor ('P') has executed an instrument with a view to creating a lasting power of attorney, or a lasting power of attorney is registered as having been conferred by P, P may, at any time when he has capacity² to do so, revoke the power³.

Other events automatically terminate a lasting power of attorney. P's bankruptcy revokes the power so far as it relates to P's property and affairs (although not his personal welfare), although interim bankruptcy restrictions orders do not bring a power of attorney to an end but have the effect of suspending the power⁴. The occurrence of certain events in relation to a donee terminate the appointment and generally revoke the power⁵.

Provision is also made for the legal consequences when a registered lasting power of attorney turns out to be invalid or has been revoked, by giving the attorneys and third parties protection from liability if they were unaware that the lasting power of attorney was invalid or had come to an end⁶.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 As to issues of capacity see PARA 641 note 3 ante.

3 See the Mental Capacity Act 2005 s 13(1), (2); and AGENCY vol 1 (2008) PARA 223.

4 See *ibid* s 13(3), (4), (8), (9); and AGENCY vol 1 (2008) PARA 224.

5 See *ibid* s 13(5)-(7), (10), (11); and AGENCY vol 1 (2008) PARA 224. The events include certain disclaimers of the appointment by the donee in accordance with relevant regulations; subject to s 13(8), (9), the death or bankruptcy of the donee or in the case of a trust corporation (see PARA 648 note 6 ante) its winding-up or dissolution; the dissolution or annulment of a marriage or civil partnership (subject to an exception if the instrument provides otherwise); and the donee's lack of capacity. The occurrence of the relevant event does not revoke the power where the donee is replaced under the terms of the instrument, or he is one of two or more persons appointed to act jointly and severally in respect of any matter and after the event there is at least one remaining donee (see also PARA 648 ante).

6 See *ibid* s 14; and AGENCY vol 1 (2008) PARA 238. Similar provision is made in relation to enduring powers of attorney by the Enduring Powers of Attorney Act 1985 s 9 (prospectively repealed): see AGENCY vol 1 (2008) PARA para 217.

UPDATE

650 Revocation of lasting powers of attorney

NOTE 5--See Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253; and AGENCY vol 1 (2008) PARA 202 et seq.

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651. Powers of court in relation to validity and operation of lasting powers of attorney.

As from a day to be appointed¹, the Court of Protection² has powers in relation to lasting powers of attorney³. The court may determine questions about validity and revocation; may direct that an instrument should not be registered or, if it is unregistered, revoke it on the grounds of fraud or undue pressure, or misbehaviour by the attorney⁴.

The court also has power to decide questions about the meaning or effect of a lasting power of attorney and to give directions to attorneys where the donor lacks capacity⁵; may give the attorney directions about producing reports, accounts, records and information and about his remuneration and expenses; has power to relieve a donee from some or all of the liabilities arising from a breach of duty; and may authorise gifts beyond the scope of what is permitted⁶.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 As to the Court of Protection under the Mental Capacity Act 2005 see PARA 750 post.

3 See *ibid* ss 22, 23; and AGENCY vol 1 (2008) PARAS 223, 230, 235, 236. The powers are similar to those under the Enduring Powers of Attorney Act 1985 s 8 (prospectively repealed): see AGENCY vol 1 (2008) PARAS 223, 235.

4 See the Mental Capacity Act 2005 s 22.

5 As to lack of capacity see PARA 641 note 3 ante.

6 See the Mental Capacity Act 2005 s 23. As to what is permitted see s 12(2); and PARA 649 ante.

UPDATE

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(iv) Advance Decisions to Refuse Treatment

652. In general.

As from a day to be appointed¹, the Mental Capacity Act 2005² makes provision in relation to advance decisions³ to refuse treatment. The legal effect of such decisions has been analysed in a number of judgments⁴. The intention of the relevant provisions of the Mental Capacity Act 2005 is to codify and clarify the common law rules⁵ and integrate them into the legislation.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 *Ie* *ibid* ss 24-26: see PARAS 653-655 post.

3 For the meaning of 'advance decision' see PARA 653 post.

4 *Eg* see *HE v A NHS Trust* [2003] EWHC 1017 (Fam), [2003] 2 FLR 408; and PARAS 612-613 ante. See also PARA 553 ante.

5 See PARA 613 ante.

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653. Advance decisions to refuse treatment.

As from a day to be appointed¹, 'advance decision' means a decision made by a person ('P'), after he has reached 18 and when he has capacity² to do so, that if: (1) at a later time and in such circumstances as he may specify, a specified treatment³ is proposed to be carried out or continued by a person providing health care for him⁴; and (2) at that time he lacks capacity⁵ to consent to the carrying out or continuation of the treatment⁶, the specified treatment is not to be carried out or continued⁷.

P may withdraw or alter an advance decision at any time when he has capacity to do so⁸.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 As to capacity and lack of capacity see PARA 641 note 3 ante.

3 As to the meaning of 'treatment' see PARA 642 note 9 ante.

4 Mental Capacity Act 2005 s 24(1)(a). For these purposes, a decision may be regarded as specifying a treatment or circumstances even though expressed in layman's terms: s 24(2).

5 See note 2 supra.

6 Mental Capacity Act 2005 s 24(1)(b).

7 Ibid s 24(1).

8 Ibid s 24(3). A withdrawal (including a partial withdrawal) need not be in writing: s 24(4). An alteration of an advance decision need not be in writing, unless s 25(5) (see PARA 654 post) applies in relation to the decision resulting from the alteration: s 24(5). There is no formal requirement that an advance decision be made in writing, but see s 25(5); and PARA 654 post.

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654. Validity and applicability of advance decisions.

As from a day to be appointed¹, an advance decision² does not affect the liability which a person may incur for carrying out or continuing a treatment³ in relation to a person ('P') unless the decision is at the material time valid, and applicable to the treatment⁴.

An advance decision is not valid if P: (1) has withdrawn the decision⁵ at a time when he had capacity⁶ to do so⁷; (2) has, under a lasting power of attorney⁸ created after the advance decision was made, conferred authority on the donee (or, if more than one, any of them) to give or refuse consent to the treatment to which the advance decision relates⁹; or (3) has done anything else clearly inconsistent with the advance decision remaining his fixed decision¹⁰.

An advance decision is not applicable to the treatment in question if at the material time P has capacity to give or refuse consent to it¹¹. An advance decision is not applicable to the treatment in question if: (a) that treatment is not the treatment specified in the advance decision¹²; (b) any circumstances specified in the advance decision are absent¹³; or (c) there are reasonable grounds for believing that circumstances exist which P did not anticipate at the time of the advance decision and which would have affected his decision had he anticipated them¹⁴.

An advance decision is not applicable to life-sustaining treatment¹⁵ unless: (i) the decision is verified by a statement by P to the effect that it is to apply to that treatment even if life is at risk¹⁶; and (ii) the decision and statement comply with the following requirements: (A) they are in writing¹⁷; (B) they are signed by P or by another person in P's presence and by P's direction¹⁸; (C) the signature is made or acknowledged by P in the presence of a witness¹⁹; and (D) the witness signs, or acknowledges his signature, in P's presence²⁰.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 For the meaning of 'advance decision' see PARA 653 ante.

3 As to the meaning of 'treatment' see PARA 642 note 9 ante.

4 Mental Capacity Act 2005 s 25(1). As to withdrawal of a decision see PARA 653 ante.

6 As to capacity see PARA 641 note 3 ante.

7 Mental Capacity Act 2005 s 25(2)(a).

8 For the meaning of 'lasting power of attorney' see PARA 642 note 16 ante. See also PARA 647 et seq ante.

9 Mental Capacity s 25(2)(b). The existence of any lasting power of attorney other than one of a description mentioned in s 25(2)(b) does not prevent the advance decision from being regarded as valid and applicable: s 25(7).

10 Ibid s 25(2)(c).

11 Ibid s 25(3).

12 Ibid s 25(4)(a).

13 Ibid s 25(4)(b).

- 14 Ibid s 25(4)(c).
- 15 For the meaning of 'life-sustaining treatment' see PARA 642 note 9 ante.
- 16 Mental Capacity Act 2005 s 25(5)(a).
- 17 Ibid s 25(5)(b), (6)(a).
- 18 Ibid s 25(5)(b), (6)(b).
- 19 Ibid s 25(5)(b), (6)(c).
- 20 Ibid s 25(5)(b), (6)(d).

UPDATE

654 Validity and applicability of advance decisions

TEXT AND NOTES 15, 16, 18-20--An advance decision refusing life-sustaining treatment is to be treated as valid and applicable to a treatment, without the requirements in the 2005 Act s 25(5)(a), (6)(b)-(d) having to be satisfied, if the following conditions are met: (1) a person providing health care for a person ('P') reasonably believes that (a) P has made the advance decision refusing life-sustaining treatment before 1 October 2007; and (b) P has lacked the capacity to comply with s 25(5)(a), (6)(b)-(d); (2) the advance decision is in writing; (3) P has not withdrawn the decision at a time when he had capacity to do so, or done anything else clearly inconsistent with the advance decision remaining his fixed decision; (4) P does not have the capacity to give or refuse consent to the treatment in question at the material time; (5) the treatment in question is the treatment specified in the advance decision; (6) any circumstances specified in the advance decision are present; (7) there are no reasonable grounds for believing that circumstances exist which P did not anticipate at the time of the advance decision and which would have affected his decision had he anticipated them: Mental Capacity Act 2005 (Transitional and Consequential Provisions) Order 2007, SI 2007/1898, art 5.

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655. Effect of advance decisions.

As from a day to be appointed¹, if a person ('P') has made an advance decision² which is valid and applicable³ to a treatment⁴, the decision has effect as if he had made it, and had had capacity⁵ to make it, at the time when the question arises whether the treatment should be carried out or continued⁶.

A person does not incur liability for carrying out or continuing the treatment unless, at the time, he is satisfied that an advance decision exists which is valid and applicable to the treatment⁷. A person does not incur liability for the consequences of withholding or withdrawing a treatment from P if, at the time, he reasonably believes that an advance decision exists which is valid and applicable to the treatment⁸.

The Court of Protection⁹ may make a declaration as to whether an advance decision: (1) exists¹⁰; (2) is valid¹¹; (3) is applicable to a treatment¹². Nothing in an apparent advance decision stops a person: (a) providing life-sustaining treatment¹³; or (b) doing any act he reasonably believes to be necessary to prevent a serious deterioration in P's condition¹⁴, while a decision as respects any relevant issue is sought from the court¹⁵.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 For the meaning of 'advance decision' see PARA 653 ante.

3 As to validity and applicability of advance decisions see PARA 654 ante.

4 As to the meaning of 'treatment' see PARA 642 note 9 ante.

5 As to capacity see PARA 641 note 3 ante.

6 Mental Capacity Act 2005 s 26(1).

7 Ibid s 26(2).

8 Ibid s 26(3).

9 As to the Court of Protection see PARA 750 post.

10 Mental Capacity Act 2005 s 26(4)(a).

11 Ibid s 26(4)(b).

12 Ibid s 26(4)(c).

13 Ibid s 26(5)(a). For the meaning of 'life-sustaining treatment' see PARA 642 note 9 ante.

14 Ibid s 26(5)(b).

15 Ibid s 26(5).

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(v) Decisions that Cannot be Made on Behalf of a Person

656. Family relationships, etc.

As from a day to be appointed¹, nothing in the Mental Capacity Act 2005 permits a decision on any of the following matters to be made on behalf of a person:

- 124 (1) consenting to marriage or a civil partnership²;
- 125 (2) consenting to have sexual relations³;
- 126 (3) consenting to a decree of divorce being granted on the basis of two years' separation⁴;
- 127 (4) consenting to a dissolution order being made in relation to a civil partnership on the basis of two years' separation⁵;
- 128 (5) consenting to a child's being placed for adoption by an adoption agency⁶;
- 129 (6) consenting to the making of an adoption order⁷;
- 130 (7) discharging parental responsibilities in matters not relating to a child's property⁸;
- 131 (8) giving a consent under the Human Fertilisation and Embryology Act 1990⁹.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 Ibid s 27(1)(a). As to marriage and civil partnerships generally see MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

3 Ibid s 27(1)(b).

4 Ibid s 27(1)(c). As to divorce on the basis of two years' separation see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 363.

5 Ibid s 27(1)(d). As to dissolution in a civil partnership on the basis of two years' separation see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 363.

6 Ibid s 27(1)(e). As to adoption generally see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 323 et seq.

7 Ibid s 27(1)(f). 'Adoption order' means: (1) an adoption order within the meaning of the Adoption and Children Act 2002 (including a future adoption order); and (2) an order under s 84 (parental responsibility prior to adoption abroad) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 359, 502); Mental Capacity Act 2005 s 27(2).

8 Ibid s 27(1)(g). As to parental responsibilities generally see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 133 et seq.

9 Ibid s 27(1)(h). As to the Human Fertilisation and Embryology Act 1990 see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 102 et seq; MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 278 et seq.

UPDATE

656 Family relationships, etc

TEXT AND NOTES--Also, (9) giving a consent under the Human Fertilisation and Embryology Act 2008: Mental Capacity Act 2005 s 27(1)(i) (added by Human Fertilisation and Embryology Act 2008 Sch 6 para 40).

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657. Mental Health Act matters.

As from a day to be appointed¹, nothing in the Mental Capacity Act 2005 authorises anyone:

- 132 (1) to give a patient medical treatment for mental disorder²; or
- 133 (2) to consent to a patient's being given medical treatment for mental disorder³,

if, at the time when it is proposed to treat the patient, his treatment is regulated by Part IV of the Mental Health Act 1983⁴.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 Ibid s 28(1)(a). 'Medical treatment', 'mental disorder' and 'patient' have the same meanings as in the Mental Health Act 1983 (see PARAS 402, 435, 552 ante): Mental Capacity Act 2005 s 28(2).

3 Ibid s 28(1)(b).

4 Ibid s 28(1). The reference in the text is a reference to the Mental Health Act 1983 Pt IV (ss 56-64) (as amended) (see PARA 551 et seq ante).

UPDATE

657 Mental Health Act matters

TEXT AND NOTES--Mental Capacity Act 2005 s 28(1A), (1B) added: Mental Health Act 2007 ss 28(10), 35(5).

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658. Voting rights.

As from a day to be appointed¹, nothing in the Mental Capacity Act 2005 permits a decision on voting at an election for any public office, or at a referendum², to be made on behalf of a person³.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 'Referendum' has the same meaning as in the Political Parties, Elections and Referendums Act 2000 s 101 (see ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARA 519): Mental Capacity Act 2005 s 29(2).

3 Ibid s 29(1). As to elections generally see ELECTIONS AND REFERENDUMS. See also PARA 619 ante.

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(vi) Restrictions on Intrusive Research

659. Research.

As from a day to be appointed¹, intrusive research² carried out on, or in relation to, a person who lacks capacity³ to consent to it is unlawful unless it is carried out: (1) as part of a research project which is for the time being approved by the appropriate body⁴ for the purposes of the Mental Capacity Act 2005⁵; and (2) in accordance with the relevant safeguards⁶.

A clinical trial which is subject to the provisions of clinical trials regulations⁷ is not to be treated as research for these purposes⁸.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 Research is intrusive if it is of a kind that would be unlawful if it was carried out: (1) on or in relation to a person who had capacity to consent to it; but (2) without his consent: *ibid* s 30(2). See note 3 *infra*.

3 As to lack of capacity see PARA 641 note 3 ante.

4 In relation to the purposes of the Mental Capacity Act 2005 s 31: see PARA 660 post. 'Appropriate body', in relation to a research project, means the person, committee or other body specified in regulations made by the appropriate authority as the appropriate body in relation to a project of the kind in question: s 30(4). For the purposes of ss 30, 32, 34, 'appropriate authority' means: (1) in relation to the carrying out of research in England, the Secretary of State; and (2) in relation to the carrying out of research in Wales, the National Assembly for Wales: s 30(6). As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante. For the meaning of 'England' see PARA 405 note 6 ante; and for the meaning of 'Wales' see PARA 405 note 7 ante. See note 5 *infra*.

5 *Ibid* s 30(1)(a). Special provision is made for where a person ('P') has consented to take part in a research project before the commencement of s 30, but before the conclusion of the project, loses capacity to consent to continue to take part in it: see s 34(1). In this situation, the appropriate authority may by regulations provide that, despite P's loss of capacity, research of a prescribed kind may be carried out on, or in relation to, P if: (1) the project satisfies prescribed requirements; (2) any information or material relating to P which is used in the research is of a prescribed description and was obtained before P's loss of capacity; and (3) the person conducting the project takes in relation to P such steps as may be prescribed for the purpose of protecting him: s 34(2). The regulations may, in particular: (a) make provision about when, for the purposes of the regulations, a project is to be treated as having begun; (b) include provision similar to any made by s 31 (see PARA 660 post), s 32 (see PARA 661 post) or s 33 (see PARA 662 post): s 34(3). 'Prescribed', in relation to regulations made under the Mental Capacity Act 2005, means prescribed by those regulations: s 64(1). As to subordinate legislation generally see PARA 406 note 68 ante.

6 *Ibid* s 30(1)(b). The safeguards are those in s 32 (see PARA 661 post) and s 33 (see PARA 662 post). See note 5 *supra*.

7 'Clinical trials regulations' means: (1) the Medicines for Human Use (Clinical Trials) Regulations 2004, SI 2004/1031 (as amended) (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 82 et seq) and any other regulations replacing those regulations or amending them; and (2) any other regulations relating to clinical trials and designated by the Secretary of State as clinical trials regulations for the purposes of the Mental Capacity Act 2005 s 30: s 30(5).

8 *Ibid* s 30(3). See note 5 *supra*.

UPDATE

659 Research

TEXT AND NOTES--See also Mental Capacity Act 2005 s 30(3A), (3B) (added by Human Fertilisation and Embryology Act 2008 Sch 7 para 25).

NOTE 4--In relation to a research project referred to in the 2005 Act ss 30-32, the 'appropriate body' is a committee established to advise on, or on matters which include, the ethics of intrusive research in relation to people who lack capacity to consent to it, and recognised for that purpose by the Secretary of State or the National Assembly for Wales: Mental Capacity Act 2005 (Appropriate Body) (England) Regulations 2006, SI 2006/2810 (amended by SI 2006/3474); Mental Capacity Act 2005 (Appropriate Body) (Wales) Regulations 2007, SI 2007/833.

NOTE 5--See the Mental Capacity Act 2005 (Loss of Capacity during Research Project) (England) Regulations 2007, SI 2007/679; and the Mental Capacity Act 2005 (Loss of Capacity during Research Project) (Wales) Regulations 2007, SI 2007/837.

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660. Requirements for approval.

As from a day to be appointed¹, the appropriate body² may not approve a research project for the purposes of the Mental Capacity Act 2005³ unless satisfied that the following requirements will be met in relation to research carried out as part of the project on, or in relation to, a person who lacks capacity⁴ to consent to taking part in the project ('P')⁵:

- 134 (1) the research must be connected with an impairing condition⁶ affecting P, or its treatment⁷;
- 135 (2) there must be reasonable grounds for believing that research of comparable effectiveness cannot be carried out if the project has to be confined to, or relate only to, persons who have capacity to consent to taking part in it⁸;
- 136 (3) the research must: (a) have the potential to benefit P without imposing on P a burden that is disproportionate to the potential benefit to P; or (b) be intended to provide knowledge of the causes or treatment of, or of the care of persons affected by, the same or a similar condition⁹;
- 137 (4) there must be reasonable arrangements in place for ensuring that the relevant safeguard requirements¹⁰ will be met¹¹.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 For the meaning of 'appropriate body' see PARA 659 note 4 ante.

3 As to such research projects see PARA 659 ante.

4 As to lack of capacity see PARA 641 note 3 ante.

5 Mental Capacity Act 2005 s 31(1).

6 'Impairing condition' means a condition which is (or may be) attributable to, or which causes or contributes to (or may cause or contribute to), the impairment of, or disturbance in the functioning of, the mind or brain: *ibid* s 31(3).

7 *Ibid* s 31(2). As to the meaning of 'treatment' see PARA 642 note 9 ante.

8 *Ibid* s 31(4).

9 *Ibid* s 31(5). If the research falls within head (3)(b) in the text but not within head (3)(a) in the text, there must be reasonable grounds for believing: (1) that the risk to P from taking part in the project is likely to be negligible; and (2) that anything done to, or in relation to, P will not interfere with P's freedom of action or privacy in a significant way, or be unduly invasive or restrictive: s 31(6).

10 Ie the requirements of *ibid* s 32 (see PARA 661 post) and s 33 (see PARA 662 post).

11 *Ibid* s 31(7).

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661. Consulting carers, etc.

As from a day to be appointed¹, if a person ('R') is conducting an approved research project², and wishes to carry out research, as part of the project, on or in relation to a person ('P') who lacks capacity³ to consent to taking part in the project⁴, R must take reasonable steps to identify a person who: (1) otherwise than in a professional capacity or for remuneration, is engaged in caring for P or is interested in P's welfare⁵; and (2) is prepared to be consulted by R under these provisions⁶.

If R is unable to identify such a person he must, in accordance with guidance issued by the appropriate authority⁷, nominate a person who is prepared to be consulted by R under these provisions⁸, but who has no connection with the project⁹.

R must provide the person identified¹⁰ or nominated¹¹ with information about the project and ask him: (a) for advice as to whether P should take part in the project¹²; and (b) what, in his opinion, P's wishes and feelings about taking part in the project would be likely to be if P had capacity in relation to the matter¹³.

If, at any time, the person consulted advises R that in his opinion P's wishes and feelings would be likely to lead him to decline to take part in the project (or to wish to withdraw from it) if he had capacity in relation to the matter, R must ensure: (i) if P is not already taking part in the project, that he does not take part in it¹⁴; (ii) if P is taking part in the project, that he is withdrawn from it¹⁵.

If treatment is being, or is about to be, provided for P as a matter of urgency and R considers that, having regard to the nature of the research and of the particular circumstances of the case it is also necessary to take action for the purposes of the research as a matter of urgency¹⁶, but it is not reasonably practicable to consult under the provisions considered above¹⁷, R may take the action if:

- 138 (A) he has the agreement of a registered medical practitioner¹⁸ who is not involved in the organisation or conduct of the research project¹⁹; or
- 139 (B) where it is not reasonably practicable in the time available to obtain that agreement, he acts in accordance with a procedure approved by the appropriate body²⁰ at the time when the research project was approved²¹.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 As to research projects see PARA 659 ante. As to the approval requirements see PARA 660 ante.

3 As to lack of capacity see PARA 641 note 3 ante.

4 Mental Capacity Act 2005 s 32(1).

5 Ibid s 32(2)(a).

6 Ibid s 32(2)(b). The fact that a person is the donee of a lasting power of attorney given by P, or is P's deputy, does not prevent him from being the person consulted under s 32: s 32(7). For the meaning of 'lasting power of attorney' see PARA 642 note 16 ante; and see also PARA 647 et seq ante. For the meaning of 'deputy' see PARA 642 note 18 ante.

7 For the meaning of 'appropriate authority' see PARA 659 note 4 ante.

8 Mental Capacity Act 2005 s 32(3)(a).

9 Ibid s 32(3)(b).

10 Ie under ibid s 32(2).

11 Ie under ibid s 32(3).

12 Ibid s 32(4)(a).

13 Ibid s 32(4)(b).

14 Ibid s 32(5)(a).

15 Ibid s 32(5)(b). However, s 32(5)(b) (see head (ii) in the text) does not require treatment that P has been receiving as part of the project to be discontinued if R has reasonable grounds for believing that there would be a significant risk to P's health if it were discontinued: s 32(6). As to the meaning of 'treatment' see PARA 642 note 9 ante.

16 Ibid s 32(8)(a).

17 Ibid s 32(8)(b).

18 For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.

19 Mental Capacity Act 2005 s 32(9)(a). However R may not continue to act in reliance on s 32(9) if he has reasonable grounds for believing that it is no longer necessary to take the action as a matter of urgency: s 32(10).

20 For the meaning of 'appropriate body' see PARA 659 note 4 ante.

21 Mental Capacity Act 2005 s 32(9)(b). As to approval of the research project see s 31; and PARA 660 ante. See note 19 supra.

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662. Additional safeguards.

As from a day to be appointed¹, nothing may be done to a person ('P') who is taking part in an approved research project² (even though he lacks capacity³ to consent to taking part), or in relation to him in the course of the research⁴:

- 140 (1) to which he appears to object (whether by showing signs of resistance or otherwise) except where what is being done is intended to protect him from harm or to reduce or prevent pain or discomfort⁵; or
- 141 (2) which would be contrary to an advance decision⁶ of his which has effect, or any other form of statement made by him and not subsequently withdrawn, of which the person conducting the research ('R') is aware⁷.

The interests of P must be assumed to outweigh those of science and society⁸. If he indicates (in any way) that he wishes to be withdrawn from the project he must be withdrawn without delay⁹. P must be withdrawn from the project, without delay, if at any time the person conducting the research has reasonable grounds for believing that one or more of the requirements for approval¹⁰ is no longer met in relation to research being carried out on, or in relation to, P¹¹. However neither of the above provisions¹² requires treatment¹³ that P has been receiving as part of the project to be discontinued if R has reasonable grounds for believing that there would be a significant risk to P's health if it were discontinued¹⁴.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 As to research projects see PARA 659 ante. As to the approval requirements see PARA 660 ante.

3 As to lack of capacity see PARA 641 note 3 ante.

4 See the Mental Capacity Act 2005 s 33(1), (2).

5 Ibid s 33(2)(a).

6 For the meaning of 'advance decision' see PARA 653 ante.

7 Mental Capacity Act 2005 s 33(2)(b).

8 Ibid s 33(3).

9 Ibid s 33(4).

10 Ie the requirements set out in ibid s 31(2)-(7): see PARA 660 heads (1)-(4) ante.

11 Ibid s 33(5).

12 Ie neither ibid s 33(4) nor s 33(5).

13 As to the meaning of 'treatment' see PARA 642 note 9 ante.

14 Mental Capacity Act 2005 s 33(6).

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(vii) Independent Mental Capacity Advocate Service

663. In general.

As from a day to be appointed¹, the Mental Capacity Act 2005² creates a new scheme for the input of an independent consultee³ where certain decisions need to be taken for particularly vulnerable people who lack capacity⁴. Such decisions would include serious medical treatment or changes in residence. The provisions are intended to supplement the powers and duties conferred elsewhere in the Mental Capacity Act 2005, and address concerns raised about safeguards for patients with a mental disorder who lack capacity and are being treated in hospital⁵.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 See *ibid* ss 35-41; and PARA 664 et seq post.

3 Ie independent mental capacity advocates: see PARA 664 post.

4 As to lack of capacity see PARA 641 note 3 ante. Such persons may include older people with dementia who have lost contact with friends and family, and people with severe learning difficulties and/or long-term mental health problems who have been in residential institutions for lengthy periods without external contacts.

5 See *R v Bournewood Community and Mental Health NHS Trust, ex p L* [1999] 1 AC 458, [1998] 3 All ER 289, HL; *HL v United Kingdom (Application 45508/99)* (2004) 81 BMLR 131, (2004) Times, 19 October, ECtHR; and PARA 437 note 7 ante.

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664. Appointment of independent mental capacity advocates.

As from a day to be appointed¹, the appropriate authority² must make such arrangements as it considers reasonable to enable persons ('independent mental capacity advocates') to be available to represent and support persons to whom certain proposed acts or decisions³ relate⁴. In making such arrangements, the appropriate authority must have regard to the principle that a person to whom a proposed act or decision relates should, so far as practicable, be represented and supported by a person who is independent of any person who will be responsible for the act or decision⁵.

The appropriate authority may make regulations as to the appointment of independent mental capacity advocates⁶, which may, in particular, provide: (1) that a person may act as an independent mental capacity advocate only in such circumstances, or only subject to such conditions, as may be prescribed⁷; (2) for the appointment of a person as an independent mental capacity advocate to be subject to approval in accordance with the regulations⁸.

For the purpose of enabling him to carry out his functions, an independent mental capacity advocate:

- 142 (a) may interview in private the person whom he has been instructed to represent⁹; and
- 143 (b) may, at all reasonable times, examine and take copies of: (i) any health record¹⁰; (ii) any record of a local authority¹¹, or held by it, compiled in connection with a social services function¹²; and
- 144 (c) any record held by a person registered under Part II of the Care Standards Act 2000¹³,

which the person holding the record considers may be relevant to the independent mental capacity advocate's investigation¹⁴.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 For the purposes of *ibid* ss 35-37, 'appropriate authority' means: (1) in relation to the provision of the services of independent mental capacity advocates in England, the Secretary of State; and (2) in relation to the provision of the services of independent mental capacity advocates in Wales, the National Assembly for Wales: s 35(7). As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante. For the meaning of 'England' see PARA 405 note 6 ante; and for the meaning of 'Wales' see PARA 405 note 7 ante.

3 The acts or decisions proposed under *ibid* ss 37-39: see PARAS 666-668 post.

4 *Ibid* s 35(1). As to the power to adjust the role of the independent mental capacity advocate see PARA 670 post.

5 *Ibid* s 35(4). The arrangements may include provision for payments to be made to, or in relation to, persons carrying out functions in accordance with the arrangements: s 35(5). See note 4 supra.

6 *Ibid* s 35(2).

- 7 Ibid s 35(3)(a). 'Prescribed', in relation to regulations made under the Mental Capacity Act 2005, means prescribed by those regulations: s 64(1). As to subordinate legislation generally see PARA 406 note 68 ante.
- 8 Ibid s 35(3)(b).
- 9 Ibid s 35(6)(a).
- 10 Ibid s 35(6)(b)(i). 'Health record' has the meaning given in the Data Protection Act 1998 s 68, as read with s 69 (as amended; prospectively amended) (see CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARAS 450, 506): Mental Capacity Act 2005 s 64(1).
- 11 'Local authority' means: (1) the council of a county in England in which there are no district councils; (2) the council of a district in England; (3) the council of a county or county borough in Wales; (4) the council of a London borough (see LONDON GOVERNMENT vol 29(2) (Reissue) PARAS 30, 36); (5) the Common Council of the City of London (see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 51 et seq); or (6) the Council of the Isles of Scilly (see LOCAL GOVERNMENT vol 69 (2009) PARA 36): ibid s 64(1). As to areas and authorities in England see LOCAL GOVERNMENT vol 69 (2009) PARA 24 et seq; and as to areas and authorities in Wales see LOCAL GOVERNMENT vol 69 (2009) PARA 37 et seq
- 12 Ibid s 35(6)(b)(ii). 'Social services function' has the meaning given in the Local Authority Social Services Act 1970 s 1A (as added) (see LOCAL GOVERNMENT vol 69 (2009) PARA 588): Mental Capacity Act 2005 s 64(1).
- 13 Ibid s 35(6)(b)(iii). The reference in the text is a reference to the Care Standards Act 2000 Pt II (ss 11-42) (as amended; prospectively amended): see SOCIAL SERVICES AND COMMUNITY CARE.
- 14 Mental Capacity Act 2005 s 35(6).

UPDATE

664 Appointment of independent mental capacity advocates

TEXT AND NOTES--In relation to England, arrangements made by the Secretary of State under the 2005 Act s 35 may include such provision as he considers reasonable for the purpose of enabling independent mental capacity advocates to be available to represent and support persons who lack capacity to agree to the outcome of an accommodation review or to protective measures taken in adult protection cases: see Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Expansion of Role) Regulations 2006, SI 2006/2883. Similar provision applies in relation to Wales: see Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) Regulations 2007, SI 2007/852, reg 9.

NOTE 4--Mental Capacity Act 2005 s 35(1) amended: Mental Health Act 2007 Sch 9 para 3.

TEXT AND NOTES 6-8--See Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006, SI 2006/1832, reg 5 (amended by SI 2009/2376); and SI 2007/852 reg 5 (amended by SI 2009/266).

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665. Functions of independent mental capacity advocates.

As from a day to be appointed¹, the appropriate authority² may make regulations as to the functions of independent mental capacity advocates³.

The regulations may, in particular, make provision requiring an advocate to take such steps as may be prescribed⁴ for the purpose of:

- 145 (1) providing support to the person whom he has been instructed to represent ('P') so that P may participate as fully as possible in any relevant decision⁵;
- 146 (2) obtaining and evaluating relevant information⁶;
- 147 (3) ascertaining what P's wishes and feelings would be likely to be, and the beliefs and values that would be likely to influence P, if he had capacity⁷;
- 148 (4) ascertaining what alternative courses of action are available in relation to P⁸;
- 149 (5) obtaining a further medical opinion where treatment is proposed and the advocate thinks that one should be obtained⁹.

The regulations may also make provision as to circumstances in which the advocate may challenge, or provide assistance for the purpose of challenging, any relevant decision¹⁰.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 For the meaning of 'appropriate authority' see PARA 664 note 2 ante.

3 Mental Capacity Act 2005 s 36(1). As to independent mental capacity advocates see PARA 664 ante.

4 As prescribed by regulations under the Mental Capacity Act 2005: see s 64(1). As to subordinate legislation generally see PARA 406 note 68 ante.

5 Mental Capacity Act 2005 s 36(2)(a).

6 Ibid s 36(2)(b).

7 Ibid s 36(2)(c). As to lack of capacity see PARA 641 note 3 ante.

8 Ibid s 36(2)(d).

9 Ibid s 36(2)(e).

10 Ibid s 36(3).

UPDATE

665 Functions of independent mental capacity advocates

TEXT AND NOTES 1-9--See Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006, SI 2006/1832, reg 6; Mental Capacity Act 2005

(Independent Mental Capacity Advocates) (Wales) Regulations 2007, SI 2007/852, reg 6.

TEXT AND NOTE 10--See SI 2006/1832 reg 7 and SI 2007/852 reg 7, which make provision for challenges to decisions affecting persons who lack capacity.

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666. Provision of serious medical treatment by an NHS body.

As from a day to be appointed¹, if an NHS body²: (1) is proposing to provide, or secure the provision of, serious medical treatment³ for a person ('P') who lacks capacity⁴ to consent to the treatment⁵; and (2) is satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate to consult in determining what would be in P's best interests⁶, before such treatment is provided the NHS body must instruct an independent mental capacity advocate⁷ to represent P⁸. If the treatment needs to be provided as a matter of urgency, it may be provided even though the NHS body has not been able to comply with this requirement⁹.

The NHS body must, in providing or securing the provision of treatment for P, take into account any information given, or submissions made, by the independent mental capacity advocate¹⁰.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 'NHS body' has such meaning as may be prescribed by regulations made for the purposes of ibid s 37 by: (1) the Secretary of State, in relation to bodies in England; or (2) the National Assembly for Wales, in relation to bodies in Wales: s 37(7). 'Prescribed', in relation to regulations made under the Mental Capacity Act 2005, means prescribed by those regulations: see s 64(1). As to subordinate legislation generally see PARA 406 note 68 ante. As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante. For the meaning of 'England' see PARA 405 note 6 ante; and for the meaning of 'Wales' see PARA 405 note 7 ante.

3 'Serious medical treatment' means treatment which involves providing, withholding or withdrawing treatment of a kind prescribed by regulations made by the appropriate authority: ibid s 37(6). As to the meaning of 'treatment' see PARA 642 note 9 ante. For the meaning of 'appropriate authority' see PARA 659 note 4 ante. See note 2 supra.

4 As to lack of capacity see PARA 641 note 3 ante.

5 Mental Capacity Act 2005 s 37(1)(a).

6 Ibid s 37(1)(b). As to best interests see PARA 642 ante.

7 As to independent mental capacity advocates see PARA 664 ante.

8 Mental Capacity Act 2005 s 37(3). As to exceptions to the application of s 37(3) see PARA 669 post. Section 37 does not apply if P's treatment is regulated by the Mental Health Act 1983 Pt IV (ss 56-64) (as amended) (see PARA 551 et seq ante): Mental Capacity Act 2005 s 37(2).

9 Ibid s 37(4).

10 Ibid s 37(5).

UPDATE

666 Provision of serious medical treatment by an NHS body

NOTE 2--For the purposes of the 2005 Act s 37 'NHS body' means (1) in relation to England, a Strategic Health Authority, an NHS foundation trust, a Primary Care Trust, an NHS Trust, or a Care Trust; (2) in relation to Wales, a Local Health Board, an NHS

trust all or most of whose hospitals, establishments and facilities are situated in Wales, or a Special Health Authority performing functions only or mainly in respect of Wales: Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006, SI 2006/1832, reg 3(1); Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) Regulations 2007, SI 2007/852, reg 3. 'Care Trust' means a body designated as a Care Trust under the Health and Social Care Act 2001 s 45; 'NHS foundation trust' has the meaning given in the Health and Social Care (Community Health and Standards) Act 2003 s 1; 'NHS trust' means a body established under the National Health Service and Community Care Act 1990 s 5; 'Primary Care Trust' means a body established under the National Health Service Act 1977 s 16A; and 'Strategic Health Authority' means a Strategic Health Authority established under the National Health Service Act 1977 s 8: SI 2006/1832 reg 3(2).

NOTE 3--For the purposes of the 2005 Act s 37 'serious medical treatment' is treatment which involves providing, withdrawing or withholding treatment in circumstances where (1) in a case where a single treatment is being proposed, there is a fine balance between its benefits to the patient and the burdens and risks it is likely to entail for him; (2) in a case where there is a choice of treatments, a decision as to which one to use is finely balanced; or (3) what is proposed would be likely to involve serious consequences for the patient: SI 2006/1832 reg 4; SI 2007/852 reg 4.

NOTE 8--Mental Health Act 1983 s 37(2) amended: Mental Health Act 2007 s 35(6).

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667. Provision of accommodation by NHS body.

As from a day to be appointed¹, if an NHS body² proposes to make arrangements: (1) for the provision of accommodation in a hospital³ or care home⁴ for a person ('P') who lacks capacity⁵ to agree to the arrangements⁶; or (2) for a change in P's accommodation to another hospital or care home⁷, and is satisfied that there is no person (other than one engaged in providing care or treatment⁸ for P in a professional capacity or for remuneration) whom it would be appropriate for it to consult in determining what would be in P's best interests⁹, then before making such arrangements the NHS body must instruct an independent mental capacity advocate¹⁰ to represent P unless it is satisfied that: (a) the accommodation is likely to be provided for a continuous period which is less than the applicable period¹¹; or (b) the arrangements need to be made as a matter of urgency¹².

If the NHS body: (i) did not instruct an independent mental capacity advocate to represent P before making the arrangements because it was satisfied that head (a) or head (b) above applied¹³; but (ii) subsequently has reason to believe that the accommodation is likely to be provided for a continuous period beginning with the day on which accommodation was first provided in accordance with the arrangements, and ending on or after the expiry of the applicable period¹⁴, it must instruct an independent mental capacity advocate to represent P¹⁵.

The NHS body must, in deciding what arrangements to make for P, take into account any information given, or submissions made, by the independent mental capacity advocate¹⁶.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 'NHS body' has such meaning as may be prescribed by regulations made for the purposes of *ibid* s 38 by: (1) the Secretary of State, in relation to bodies in England; or (2) the National Assembly for Wales, in relation to bodies in Wales: s 38(8). 'Prescribed', in relation to regulations made under the Mental Capacity Act 2005, means prescribed by those regulations: s 64(1). As to subordinate legislation generally see PARA 406 note 68 ante. As to the Secretary of State and the National Assembly for Wales see PARAS 410-411 ante. For the meaning of 'England' see PARA 405 note 6 ante; and for the meaning of 'Wales' see PARA 405 note 7 ante.

3 'Hospital' means: (1) a health service hospital as defined by the National Health Service Act 1977 s 128 (as amended) (see HEALTH SERVICES vol 54 (2007) PARA 21); or (2) an independent hospital as defined by the Care Standards Act 2000 s 2 (as amended) (see SOCIAL SERVICES AND COMMUNITY CARE): Mental Capacity Act 2005 s 38(7).

4 'Care home' has the meaning given in the Care Standards Act 2000 s 3 (see SOCIAL SERVICES AND COMMUNITY CARE): Mental Capacity Act 2005 s 38(6).

5 As to lack of capacity see PARA 641 note 3 ante.

6 Mental Capacity Act 2005 s 38(1)(a).

7 *Ibid* s 38(1)(b).

8 As to the meaning of 'treatment' see PARA 642 note 9 ante.

9 Mental Capacity Act 2005 s 38(1).

10 As to independent mental capacity advocates see PARA 664 ante.

11 Mental Capacity Act 2005 s 38(3)(a). 'Applicable period' means: (1) in relation to accommodation in a hospital, 28 days; and (2) in relation to accommodation in a care home, eight weeks: s 38(9). As to exceptions to the application of s 38(3) see PARA 669 post. Section 38 does not apply if P is accommodated as a result of an obligation imposed on him under the Mental Health Act 1983: Mental Capacity Act 2005 s 38(2).

12 Ibid s 38(3)(b). See note 11 supra.

13 Ibid s 38(4)(a). As to exceptions to the application of s 38(4) see PARA 669 post.

14 Ibid s 38(4)(b). See note 13 supra.

15 Ibid s 38(4). See note 13 supra.

16 Ibid s 38(5).

UPDATE

667 Provision of accommodation by NHS body

TEXT AND NOTES--The Mental Capacity Act 2005 s 38 does not apply if an independent mental capacity advocate must be appointed under s 39A or 39C (see PARA 641A) (whether or not by the NHS body) to represent the person who becomes subject to Sch A1, and the hospital or care home in which the person is to be accommodated under the arrangements referred to in s 38 is the relevant hospital or care home under the authorisation there referred to: Mental Capacity Act 2005 s 38(2A), (10) (added by Mental Health Act 2007 Sch 9 para 4).

NOTE 2--In relation to England, for the purposes of the Mental Capacity Act 2005 s 38 'NHS body' has the meaning prescribed by the Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006, SI 2006/1832, reg 3(1) (see PARA 666 NOTE 2).

NOTE 3--Mental Capacity Act 2005 s 38(7) amended: National Health Service (Consequential Provisions) Act 2006 Sch 1 para 278.

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668. Provision of accommodation by local authority.

As from a day to be appointed¹, if a local authority² proposes to make arrangements: (1) for the provision of residential accommodation for a person ('P') who lacks capacity³ to agree to the arrangements⁴; or (2) for a change in P's residential accommodation⁵, and is satisfied that there is no person (other than one engaged in providing care or treatment for P in a professional capacity or for remuneration) whom it would be appropriate for it to consult in determining what would be in P's best interests⁶, then before making such arrangements the local authority must instruct an independent mental capacity advocate⁷ to represent P unless it is satisfied that: (a) the accommodation is likely to be provided for a continuous period of less than eight weeks⁸; or (b) the arrangements need to be made as a matter of urgency⁹.

If the local authority: (i) did not instruct an independent mental capacity advocate to represent P before making the arrangements because it was satisfied that head (a) or head (b) above applied¹⁰; but (ii) subsequently has reason to believe that the accommodation is likely to be provided for a continuous period that will end eight weeks or more after the day on which accommodation was first provided in accordance with the arrangements¹¹, it must instruct an independent mental capacity advocate to represent P¹².

The local authority must, in deciding what arrangements to make for P, take into account any information given, or submissions made, by the independent mental capacity advocate¹³.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 For the meaning of 'local authority' see PARA 664 note 11 ante.

3 As to lack of capacity see PARA 641 note 3 ante.

4 Mental Capacity Act 2005 s 39(1)(a).

5 Ibid s 39(1)(b).

6 Ibid s 39(1).

7 As to independent mental capacity advocates see PARA 664 ante.

8 Mental Capacity Act 2005 s 39(4)(a). As to exceptions to the application of s 39(4) see PARA 669 post. Section 39 applies only if the accommodation is to be provided in accordance with: (1) the National Assistance Act 1948 s 21 or s 29 (as amended) (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1029 et seq); or (2) the Mental Health Act 1983 s 117 (as amended) (see PARA 414 ante), as the result of a decision taken by the local authority under the National Health Service and Community Care Act 1990 s 47 (as amended) (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1015); Mental Capacity Act 2005 s 39(2). In addition, s 39 does not apply if P is accommodated as a result of an obligation imposed on him under the Mental Health Act 1983 (eg a conditional discharge: see PARAS 524, 530, 570 ante); Mental Capacity Act 2005 s 39(3). See also PARA 471 head (1) ante.

9 Ibid s 39(4)(b). See note 8 supra.

10 Ibid s 39(5)(a). As to exceptions to the application of s 39(5) see PARA 669 post.

11 Ibid s 39(5)(b). See note 10 supra.

12 Ibid s 39(5). See note 10 supra.

13 Ibid s 39(6).

UPDATE

668 Provision of accommodation by local authority

TEXT AND NOTES--The Mental Capacity Act 2005 s 39 does not apply if an independent mental capacity advocate must be appointed under s 39A or 39C (see PARA 641A) (whether or not by the NHS body) (see PARA 667) to represent the person who becomes subject to Sch A1, and the place in which he is to be accommodated under the arrangements referred to in s 39 is the place under the authorisation there referred to: Mental Capacity Act 2005 s 39(3A), (7) (added by Mental Health Act 2007 Sch 9 para 5).

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669. Exceptions to the involvement of an independent mental capacity advocate.

As from a day to be appointed¹, the provisions as to the involvement of an independent mental capacity advocate² in relation to serious medical treatment by an NHS body and accommodation by an NHS body and a local authority³ do not apply if there is:

- 150 (1) a person nominated by the relevant person lacking capacity ('P')⁴ (in whatever manner) as a person to be consulted in matters affecting his interests⁵;
- 151 (2) a donee of a lasting power of attorney⁶ created by P⁷;
- 152 (3) a deputy⁸ appointed by the Court of Protection for P⁹; or
- 153 (4) a donee of an enduring power of attorney¹⁰ created by P¹¹.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 As to independent mental capacity advocates see PARA 664 ante.

3 See the Mental Capacity Act 2005 s 37(3) (see PARA 666 ante), s 38(3), (4) (see PARA 667 ante), s 39(4), (5) (see PARA 668 ante).

4 Ie under ibid ss 37-39. As to lack of capacity see PARA 641 note 3 ante.

5 Ibid s 40(1).

6 As to lasting powers of attorney see PARA 647 et seq ante.

7 Mental Capacity Act 2005 s 40(2).

8 For the meaning of 'deputy' see PARA 642 note 18 ante.

9 Mental Capacity Act 2005 s 40(3). As to the Court of Protection see PARA 750 post.

10 Ie within the meaning of ibid Sch 4: see PARA 647 note 3; and AGENCY vol 1 (2008) PARA 195 et seq.

11 Ibid s 40(4).

UPDATE

669 Exceptions to the involvement of an independent mental capacity advocate

TEXT AND NOTES--The duty imposed by the Mental Capacity Act 2005 s 37(3), 38(3) or (4), 39(4) or (5), 39A(3) (see PARA 641A), 39C(3) (see PARA 641A) or 39D(2) (see PARA 641A) does not apply where (1) there is a person nominated by P (in whatever manner) as a person to be consulted on matters to which that duty relates, (2) a donee of a lasting power of attorney created by P who is authorised to make decisions in relation to those matters, or (3) a deputy appointed by the court for P with power to make decisions in relation to those matters: s 40(1) (s 40 substituted by Mental Health Act 2007 s 49; and amended by Sch 9 para 7). A person appointed under the Mental Capacity Act 2005 Sch A1 to be P's representative is not, by virtue of that

appointment, a person nominated by P as a person to be consulted in matters to which a duty mentioned in subsection (1) relates: s 40(2).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/5. MENTAL DISORDER AND LEGAL INCAPACITY/(7) PERSONS WHO LACK CAPACITY UNDER THE MENTAL CAPACITY ACT 2005/(vii) Independent Mental Capacity Advocate Service/670. Power to adjust role of independent mental capacity advocate.

670. Power to adjust role of independent mental capacity advocate.

As from a day to be appointed¹, the appropriate authority² may make regulations: (1) expanding the role of independent mental capacity advocates³ in relation to persons who lack capacity⁴; and (2) adjusting the obligation to make arrangements imposed by the provision on the appointment of such advocates⁵.

The regulations may, in particular: (a) prescribe certain circumstances⁶ in which an independent mental capacity advocate must, or circumstances in which one may, be instructed by a person of a prescribed⁷ description to represent a person who lacks capacity⁸; and (b) include provision similar to any made by the provisions in relation to: (i) serious medical treatment by an NHS body; (ii) accommodation by an NHS body; (iii) accommodation by a local authority; or (iv) exceptions⁹.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARAS 406, 595 ante.

2 'Appropriate authority' has the same meaning as in *ibid* s 35 (see PARA 664 note 2 ante): s 41(3).

3 As to independent mental capacity advocates see PARA 664 ante.

4 Mental Capacity Act 2005 s 41(1)(a).

5 *Ibid* s 41(1)(b). The provision referred to in the text is s 35: see PARA 664 ante.

6 *Ie* circumstances different to those in *ibid* s 37 (see PARA 666 ante), s 38 (see PARA 667 ante) and s 39 (see PARA 668 ante).

7 *Ie* prescribed by regulations under the Mental Capacity Act 2005: see s 64(1). As to subordinate legislation generally see PARA 406 note 68 ante.

8 *Ibid* s 41(2)(a). As to lack of capacity see PARA 641 note 3 ante.

9 *Ibid* s 41(2)(b). The provisions referred to in the text are those of s 37 (see PARA 666 ante), s 38 (see PARA 667 ante), s 39 (see PARA 668 ante) or s 40 (see PARA 669 ante).

UPDATE

670 Power to adjust role of independent mental capacity advocate

TEXT AND NOTES--See the Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) Regulations 2007, SI 2007/852, reg 8.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(1) INTRODUCTION/671. The former jurisdiction in lunacy.

6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS

(1) INTRODUCTION

671. The former jurisdiction in lunacy.

Until the coming into force of the Mental Health Act 1959¹, the jurisdiction in lunacy under which a patient's property was administered was partly statutory and partly an inherent jurisdiction under the royal prerogative exercised by the Lord Chancellor² and certain of the judges³ to whom the jurisdiction was entrusted under the sign manual⁴.

In theory the royal prerogative still exists, but there is no one to exercise it since no one is now entrusted under the sign manual with the exercise of the inherent jurisdiction under the royal prerogative⁵, nor is there any person qualified to hold an inquisition. In effect, therefore, the jurisdiction is now entirely statutory.

1 I.e. the Mental Health Act 1959 Pt VIII (ss 100-121) (largely repealed). See now the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended). The Mental Health Act 1983 made changes in relation to the admission, reception and treatment of mentally disordered patients but not to the management of their property and affairs. The Mental Health Act 1983 Pt VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

3 See COURTS vol 10 (Reissue) PARA 515 et seq.

4 See CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 309. It was a condition precedent to the exercise of the inherent jurisdiction that the patient should be found by inquisition to be of unsound mind.

5 The jurisdiction under the prerogative remained at large in those to whom the warrant was addressed until the coming into operation of the Mental Health Act 1959. The last royal warrant, dated 10 April 1956, was revoked by royal warrant dated 1 November 1960.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(1) INTRODUCTION/672. Modern statutory jurisdiction.

672. Modern statutory jurisdiction.

Until a day to be appointed¹, the statutory jurisdiction for the management of the property and affairs of patients² is conferred by the Mental Health Act 1983³. It is exercised where the judge⁴ is satisfied that a person is incapable, by reason of mental disorder⁵, of managing and administering his property and affairs⁶, and also in emergencies, where the judge has reason to believe it is necessary to make immediate provision pending determination of the question⁷.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) and the Enduring Powers of Attorney Act 1985 are repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 For the meaning of 'patient' see PARA 681 post.

3 Ie the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed). Part VII (as amended; prospectively amended and repealed) must be construed as covering only business matters, legal transactions and other dealings of a similar kind and does not extend to deciding questions relating to medical treatment: *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545, HL. There is also jurisdiction under the Enduring Powers of Attorney Act 1985: see PARA 673 post; and AGENCY vol 1 (2008) PARA 194 et seq. See also note 1 supra.

4 As to the judge see PARA 674 post.

5 For the definition and classification of 'mental disorder' see PARA 402 ante.

6 Mental Health Act 1983 s 94(2); and see PARA 681 post.

7 See *ibid* s 98; and PARA 684 post.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(1) INTRODUCTION/673. Powers of attorney.

673. Powers of attorney.

The following provisions have effect until a day to be appointed¹. An enduring power of attorney is not revoked by the subsequent mental incapacity of the donor, but the donee may not do anything under the authority of the power except as directed or authorised by the court unless or until the instrument creating the power has been registered by the court². An enduring power is revoked on the exercise by the court of any of its powers under Part VII of the Mental Health Act 1983³ if, but only if, the court so directs⁴.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) and the Enduring Powers of Attorney Act 1985 are repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARAS 641 et seq ante, 749 et seq post. As to lasting powers of attorney (which replace enduring powers of attorney) see PARA 647 et seq ante. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 See the Enduring Powers of Attorney Act 1985 s 1 (prospectively repealed); and AGENCY vol 1 (2008) PARA 194.

3 See note 1 supra.

4 See the Enduring Powers of Attorney Act 1985 s 2(11) (prospectively repealed); and AGENCY vol 1 (2008) PARA 198.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(2) THE SPECIAL JUDICIARY AND THE COURT OF PROTECTION/674. Persons by whom the jurisdiction is exercisable.

(2) THE SPECIAL JUDICIARY AND THE COURT OF PROTECTION

674. Persons by whom the jurisdiction is exercisable.

Until a day to be appointed¹, the functions expressed to be conferred by the Mental Health Act 1983² on 'the judge' are exercisable by the Lord Chancellor³ or by any one of certain judges of the Supreme Court from time to time nominated by him to act for the purpose⁴, and referred to in the Act as 'nominated judges'⁵. In pursuance of his powers, the Lord Chancellor has nominated all the judges for the time being of the Chancery Division.

Subject to the qualifications mentioned below, the functions conferred by the Mental Health Act 1983 are also exercisable by the master⁶ of the Court of Protection⁷, by the Public Trustee⁸ and by such other officers of the Court of Protection as may be so nominated⁹ by the Lord Chancellor¹⁰. References in Part VII of the Mental Health Act 1983 to 'the judge' are to be construed accordingly¹¹.

The functions are exercisable: (1) in the case of the master of the Court of Protection, the Public Trustee¹², or a nominated officer, subject to any express provision to the contrary in Part VII of the Mental Health Act 1983 or any rules¹³ made under it¹⁴; (2) in the case of the Public Trustee, subject to the directions of the master¹⁵; and (3) in the case of a nominated officer, so far only as may be provided by the instrument by which he is nominated¹⁶.

In practice the nominated judges only exercise such functions as are beyond the jurisdiction of the master of the Court of Protection, and matters which, in the exercise of his discretion, the master refers to them¹⁷. The business of the nominated judges is disposed of in chambers unless in a particular case a judge otherwise directs¹⁸.

Appeal from a decision of the master or a nominated officer lies to a nominated judge¹⁹.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 Ie the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed).

3 In practice the Lord Chancellor has only exercised his jurisdiction where he has exclusive jurisdiction, namely in respect of the powers vested in a patient as patron of a benefice: *ibid* s 96(5). In future, however, powers of ecclesiastical patronage will be exercised on the advice of the Prime Minister: see PARA 702 post. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq. As to the responsibilities of the Lord Chancellor under the Mental Health Act 1983 see generally para 412 ante.

4 See *ibid* ss 93(1), 94(1).

5 *Ibid* ss 93(1), 94(1). As from a day to be appointed, s 93(1) is amended so that the reference to the Lord Chancellor is changed to refer to the Lord Chief Justice on consultation with the Lord Chancellor and the reference to the Supreme Court is changed to refer to Senior Courts: see s 93(1) (prospectively amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 150, 151(1), (2)). As from a day to be appointed, provision is made for the Lord Chief Justice to nominate a judicial officer holder under the Constitutional Reform Act 2005: see the Mental Health Act 1983 s 93(5) (prospectively added by the Constitutional Reform Act 2005 Sch 4 Pt 1 paras 150, 151(1), (5)). At the date at which this volume states the law no such day or days had been appointed.

6 le when acting in the exercise of his functions under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed).

7 As to the Court of Protection see PARAS 676, 681 et seq post.

8 See note 12 infra.

9 le under the Mental Health Act 1983 s 93(4). These officers are 'nominated officers'. As from a day to be appointed, s 93(4) is amended so as to include a reference to the concurrence of the Lord Chief Justice: s 93(4) (prospectively amended by the Constitutional Reform Act 2005 Sch 4 Pt 1 paras 150, 151(1), (4)). At the date at which this volume states the law no such day had been appointed. See note 5 supra.

10 Mental Health Act 1983 s 94(1) (amended by the Public Trustee and Administration of Funds Act 1986 s 2(2)(a)). The jurisdiction is also exercisable by any nominated judge. See *Re D (J)* [1982] Ch 237, [1982] 2 All ER 37 (nominated judge on appeal not fettered by decision of master).

The office of deputy master has been abolished: see the Supreme Court Act 1981 s 89(6) (repealed); and the Supreme Court (Officers) (No 2) Order 1982, SI 1982/1755 (spent).

As from a day to be appointed, the Mental Health Act 1983 s 94(1) is amended so as to omit the reference to the Lord Chancellor: see s 94(1) (prospectively amended by the Constitutional Reform Act 2005 ss 15(1), 146, Sch 4 Pt 1 paras 150, 152, Sch 18 Pt 2). At the date at which this volume states the law no such day or days had been appointed.

11 Mental Health Act 1983 s 94(1). Cf the Court of Protection Rules 2001, SI 2001/824, r 2(1), by which 'judge' means only the Lord Chancellor or a nominated judge. See note 10 supra.

12 The Public Trustee was appointed receiver under the Mental Health Act 1983 on 2 January 1987 following enactment of the Public Trustee and Administration of Funds Act 1986. See further PARA 748 post.

13 le the Court of Protection Rules 2001, SI 2001/824 (as amended): see PARA 676 post. These rules are made under the Mental Health Act 1983 Pt VII (as amended; prospectively amended), which is to be repealed by the Mental Capacity Act 2005 (see note 1 supra), and will be replaced by new rules under s 51 (see PARAS 750, 752 post).

14 Mental Health Act 1983 s 94(1)(a) (amended by the Public Trustee and Administration of Funds Act 1986 s 2(2)(b)).

15 Mental Health Act 1983 s 94(1)(aa) (added by the Public Trustee and Administration of Funds Act 1986 s 2(2)(b)). In such cases or circumstances as may be prescribed by rules under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) or by directions of the master, the function of the judge is to be exercised by the Public Trustee, subject to any directions of the master as to their exercise: s 94(1A) (added by the Public Trustee and Administration of Funds Act 1986 s 2(2)(c)). See further PARA 748 post.

16 Mental Health Act 1983 s 94(1)(b).

17 See the Court of Protection Rules 2001, SI 2001/824, r 40; and PARA 675 post. See note 12 supra.

18 Ibid rr 37, 40; and see PARA 731 post. See also *Re W(EEM)* [1971] Ch 123 at 140-141, [1970] 2 All ER 502 at 509, Ct of Protection, per Ungood-Thomas J (subject to the safeguards governed by statute and the rules made under it, the principles upon which the court acted and the manner of their application should be made known to the public immediately).

19 Mental Health Act 1983 s 105(1); and see PARA 742 post.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

674 Persons by whom the jurisdiction is exercisable

NOTES--See also *Practice Direction (Court of Protection: fixed costs)* (1 May 2009, unreported).

NOTES 5, 9, 10--Day now appointed day: SI 2006/1014.

NOTE 10--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(2) THE SPECIAL JUDICIARY AND THE COURT OF PROTECTION/675. Construction of references in other Acts to judge or authority.

675. Construction of references in other Acts to judge or authority.

Until a day to be appointed¹, the functions expressed to be conferred by any enactment² not contained in Part VII of the Mental Health Act 1983³ on the judge having jurisdiction under that part of that Act are exercisable by the Lord Chancellor⁴ or by a nominated judge⁵. Subject to any express provision to the contrary, the functions expressed to be conferred by any such enactment on the authority having jurisdiction under Part VII of the Mental Health Act 1983 are exercisable by the Lord Chancellor, a nominated judge, the Public Trustee⁶, the master of the Court of Protection⁷ or any officer nominated by the Lord Chancellor⁸ to act for the purposes of that part of that Act⁹. However, the exercise of those functions by the Public Trustee or a nominated officer is subject to any directions of the master and the functions are exercisable by a nominated officer so far only as may be provided by the instrument by which he is nominated¹⁰. Subject to these provisions, in any such enactment, references to the judge having jurisdiction under Part VII of the Mental Health Act 1983 are to be construed as references to the Lord Chancellor or a nominated judge, and references to the authority having jurisdiction under that part of the Act are to be construed as references to the Lord Chancellor, a nominated judge, the master of the Court of Protection, the Public Trustee or a nominated officer¹¹.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 See the Interpretation Act 1978 ss 20(2), 24(2).

3 Ie the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed).

4 As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

5 Mental Health Act 1983 s 111(1). As from a day to be appointed, the provisions of s 111(1), (2), (4) are amended so as to omit the references to the Lord Chancellor: see s 111(1), (2), (4) (prospectively amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 150, 151(1)-(4), Sch 18 Pt 2). At the date at which this volume states the law no such day had been appointed. As to the nominated judge see PARA 674 ante.

6 Mental Health Act 1983 s 111(2) (amended by the Public Trustee and Administration of Funds Act 1986 s 2(3)(a)). The Public Trustee's exercise of such functions is subject to any directions of the master of the Court of Protection, and exercisable only so far as may be provided by any rules made under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) or by the master: s 111(2A), (3A) (added by the Public Trustee and Administration of Funds Act 1986 s 2(3)(b), (c)). See note 5 supra. As to the Public Trustee see PARA 748 post.

7 As to the Court of Protection see PARAS 676, 681 et seq post. As to the new Court of Protection under the Mental Capacity Act 2005 see PARA 750 post. See also note 1 supra.

8 As to nominated officers see PARA 674 ante.

9 Mental Health Act 1983 s 111(2). See note 5 supra.

10 Ibid s 94(1)(aa), (b) (s 94(1)(aa) added by the Public Trustee and Administration of Funds Act 1986 s 2(2)(b)); and see PARA 674 ante.

11 Mental Health Act 1983 s 111(4). See note 5 supra.

For an example of the formula 'the judge having jurisdiction' under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) see the Fines and Recoveries Act 1833 ss 38, 48, 49 (amended by the Statute Law Revision (No 2) Act 1988; the Mental Health Act 1959 s 149(1), Sch 7 Pt I; and the Mental Health Act 1983 s 148(1), Sch 4 para 1; prospectively amended by the Mental Capacity Act 2005 s 67(1), Sch 6 para 1(1), (3)). For an example of the formula 'the authority having jurisdiction' under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) see the Trustee Act 1925 s 54 (substituted by the Mental Health Act 1959 Sch 7 Pt I; and amended by the Mental Health Act 1983 Sch 4 para 4; prospectively amended by the Mental Capacity Act 2005 Sch 6 para 3(1), (4)(a), (b), (c), Sch 7 and the Constitutional Reform Act 2005 s 12(2), Sch 1 Pt 2 para 6); and see PARA 721 post.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

675 Construction of references in other Acts to judge or authority

NOTES 5, 11--Amendments made by Constitutional Reform Act 2005 now in force: SI 2006/1014.

NOTE 11--Amendments made by Mental Capacity Act 2005 Sch 6 now in force: SI 2007/1897.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(2) THE SPECIAL JUDICIARY AND THE COURT OF PROTECTION/676. The Court of Protection.

676. The Court of Protection.

Until a day to be appointed¹, the Court of Protection, although not a court in the usually accepted sense but an office of the Supreme Court², is responsible for the protection and management of the affairs of persons under disability³. It has a master appointed by the Lord Chancellor⁴.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the new Court of Protection under the Mental Capacity Act 2005 see PARA 750 post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the Supreme Court generally see COURTS vol 10 (Reissue) PARA 501 et seq.

3 Mental Health Act 1983 s 93(2). As from a day to be appointed, s 93(2) is amended so as to refer to the Senior Courts instead of the Supreme Court, to Her Majesty instead of the Lord Chancellor, and to the Senior Courts Act 1981 instead of the Supreme Court Act 1981: Mental Health Act 1983 s 93(2) (prospectively amended by the Constitutional Reform Act 2005 ss 14, 59(5), Sch 3 para 4, Sch 11 Pt 2 para 4(1), (3)). At the date at which this volume states the law no such day had been appointed.

From 2 January 1987 the title 'Court of Protection' applies only to what was formerly entitled the Judicial Division of the Court of Protection: see *Practice Direction* [1987] 1 All ER 403, [1987] 1 WLR 63.

For observations on how information regarding the principles on which the court acts should be made available to the public see *Re W(EM)* [1971] Ch 123, [1970] 2 All ER 502, Ct of Protection; and PARA 674 note 18 ante.

As to the new Court of Protection under the Mental Capacity Act 2005 see PARA 750 post. See also notes 1 supra, 4 infra.

4 Mental Health Act 1983 s 93(2). The master of the Court of Protection must have a seven-year general qualification (ie as barrister or solicitor): see the Supreme Court Act 1981 Sch 2 Pt 2 entry 11 (Sch 2 substituted by the Courts and Legal Services Act 1990 s 71(2), Sch 10 para 49). As from a day to be appointed, the Supreme Court Act 1981 Sch 2 Pt 2 entry 11 (as substituted) is repealed by the Mental Capacity Act 2005 s 67(1), (2), Sch 6 para 28, Sch 7. At the date at which this volume states the law no such day had been appointed.

The master must take the oath of allegiance and judicial oath before the Lord Chancellor: Mental Health Act 1983 s 93(3). As from a day to be appointed, s 93(3) is amended so as to refer to the Lord Chief Justice instead of the Lord Chancellor: see s 93(3) (prospectively amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 150, 151(1), (3)). At the date at which this volume states the law no such day had been appointed. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

676 The Court of Protection

NOTES--See *Practice Note (Ancillary Relief Orders: Conveyancing for Mentally Incapacitated Adults)* [2006] 1 FLR 480, for the law and practice applying to the

implementation of property adjustment orders and orders for sale in ancillary relief proceedings where one of the parties is under mental incapacity; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 498.

NOTES 1, 4--Amendments made by Mental Capacity Act 2005 now in force: SI 2007/1897.

NOTE 3--Constitutional Reform Act 2005 Sch 3 para 4, Sch 11 para 4 now in force: SI 2006/1014, SI 2009/1604.

NOTE 4--Supreme Court Act 1981 Sch 2 (now Senior Courts Act 1981 Sch 2) substituted: Tribunals, Courts and Enforcement Act 2007 Sch 10 para 13(3). See also Sch 10 para 13(4), (5).

Constitutional Reform Act 2005 Sch 4 paras 150, 151 now in force: SI 2006/1014.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(2) THE SPECIAL JUDICIARY AND THE COURT OF PROTECTION/677. Regulation of procedure.

677. Regulation of procedure.

Until a day to be appointed¹, proceedings before the judge² with respect to persons suffering or alleged to be suffering from mental disorder are conducted in accordance with rules³ which have been made by the Lord Chancellor⁴ under statutory powers⁵.

In addition to regulating the manner in which proceedings are to be conducted⁶, the rules provide for the making of inquiries⁷, for the giving of security and the rendering of accounts by receivers and others⁸, for percentage and other fees and costs payable in relation to proceedings, and for the charging of a percentage on the patient's estate⁹.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the judge see PARA 674 ante.

3 See the Court of Protection Rules 2001, SI 2001/824 (amended by SI 2001/977; SI 2002/833; SI 2004/1291; SI 2004/1662; SI 2005/667). These rules are made under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) (see note 1 supra), and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post).

4 As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

5 See the Mental Health Act 1983 ss 106-108. As from a day to be appointed, s 108(1) is amended to provide that rules under s 106(5) are to be made by the Lord Chancellor after consulting the Lord Chief Justice; that rules under any other provision of Pt VII (as amended; prospectively amended and repealed) are to be made in accordance with the Constitutional Reform Act 2005 Sch 1 Pt 1; and that the Lord Chief Justice may nominate a judicial office holder to exercise his functions under the Mental Health Act 1983 s 108: see s 108 (prospectively amended by the Constitutional Reform Act 2005 ss 12(2), 15(1), Sch 1 Pt 2 paras 14, 15, Sch 4 Pt 1 paras 150, 156(1), (2), (3)). At the date at which this volume states the law no such day had been appointed.

The matters concerning which rules may be made include the making of inquiries, the institution, carrying on and termination of proceedings, the persons entitled to institute or to participate in proceedings, evidence in proceedings and the enforcement of orders and directions (Mental Health Act 1983 s 106(2)(a)-(f)), costs and fees (s 106(5)), security by receivers and the rendering of accounts by receivers and others (s 107), and incidental, supplemental and transitional provisions (s 108(2)). There is power to make rules for authorising or requiring the attendance and examination of persons suffering or alleged to be suffering from mental disorder, the furnishing of information and the production of documents: see s 106(3). This power is without prejudice to the provisions by which the judge has High Court powers for securing the attendance of witnesses and the production of documents (see PARA 732 post): s 104(1).

6 See the Court of Protection Rules 2001, SI 2001/824 (as amended). As to proceedings generally see PARA 726 et seq post.

7 See *ibid* rr 67-71 (as amended); and PARAS 705, 733 post.

8 See *ibid* rr 61-66 (as amended); and PARAS 710-713 post.

9 See *ibid* rr 76-89 (as amended and added); and PARAS 739-740 post. A charge on the estate is not to operate as a forfeiture of any interest of the patient in any property: Mental Health Act 1983 s 106(6). Section 106 (except s 106(4)) applies for the purposes of the Enduring Powers of Attorney Act 1985: s 10(1). The Enduring Powers of Attorney Act 1985 is repealed by the Mental Capacity Act 2005 Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. See PARA 673 ante. See also note 1 supra.

The Court of Protection Rules 2001, SI 2001/824 (as amended) are supplemented by the Court of Protection (Enduring Powers of Attorney) Rules 2001, SI 2001/825 (amended by SI 2002/832; SI 2002/1944; SI 2005/668; SI 2005/3126), which make provision for the registration and cancellation of enduring powers and fix the fees for registering an enduring power and for a search of the register. As to enduring powers of attorney see PARA 673 ante; and AGENCY vol 1 (2008) PARA 194 et seq.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

677 Construction of references in other Acts to judge or authority

NOTE 5--Amendments made by Constitutional Reform Act 2005 now in force: SI 2006/1014.

NOTE 9--SI 2001/825 replaced: Court of Protection Rules 2007, SI 2007/1744.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(2) THE SPECIAL JUDICIARY AND THE COURT OF PROTECTION/678. Inspection of records.

678. Inspection of records.

Leave must be obtained before the records and documents filed in the Court of Protection may be inspected¹, whether they relate to a patient still alive² or to a deceased patient³. However, liberty to inspect will be given to any applicant on satisfying the master that it is required for a reasonable and proper purpose, provided that the patient, if alive, is not injured by it⁴. Until a day to be appointed⁵, reports of the Lord Chancellor's Visitors⁶ and information in such reports must not be disclosed except to the judge⁷ and any person authorised by him⁸. On an application to determine proceedings, and also when the question is the initial one whether a person is a 'patient' within the meaning of the Mental Health Act 1983⁹, the judge in exercising his discretion should lean towards allowing disclosure at least to the alleged patient's legal and medical advisers and should refuse it only where he feels that the interests of the particular alleged patient would best be served by such refusal¹⁰. In all other cases the judge should only direct disclosure if he sees a positive advantage in doing so.

1 *Re Strachan* [1895] 1 Ch 439, CA; *Re E (Mental Patient)* [1985] 1 All ER 609, [1985] 1 WLR 245, CA. As to the Court of Protection see PARA 676 ante. See also PARA 681 et seq post.

2 *Re Sartoris' Lunacy, Wylde v Arnold* (1862) 1 New Rep 4.

3 *Re Silcock's Lunacy, Hutton v Hutton* (1862) 1 New Rep 4.

4 *Re Strachan* [1895] 1 Ch 439, CA; *Re Wood, Banner v England* (1863) 4 De G J & Sm 134; *Re Smyth* (1880) 15 ChD 286, CA.

5 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

6 As to the Lord Chancellor's Visitors see PARA 747 post.

7 As to the judge see PARA 674 ante.

8 Mental Health Act 1983 s 103(8). See further PARA 747 post. Disclosure to the parties' legal and medical advisers is usually authorised when the patient's capacity is in dispute: *Re EAKM* (1953) unreported, per Denning LJ; but see *Re B--* [1892] 3 Ch 194. It was said in *Re Strachan* [1895] 1 Ch 439 at 444, CA, that, after a patient's death, inspection of the reports to the court by its medical advisers is never allowed. See also PARA 598 ante.

9 See PARA 681 post.

10 *Re WLW* [1972] Ch 456 at 462, [1972] 2 All ER 433 at 439, Ct of Protection, obiter per Goff J. As to the rules governing such disclosure see PARA 747 post.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(2) THE SPECIAL JUDICIARY AND THE COURT OF PROTECTION/679. Chancery jurisdiction in aid.

679. Chancery jurisdiction in aid.

Although a nominated judge¹ sitting in that capacity can only exercise the jurisdiction arising under the Mental Health Act 1983, it may sometimes be convenient for him to sit in a dual capacity as nominated judge and as a judge of the Chancery Division². As the judges in fact nominated are judges of the Chancery Division no difficulty in the exercise of a dual jurisdiction arises.

If a judge of the Court of Appeal³ were to be nominated as a judge under the Mental Health Act 1983⁴ the necessary authority for him to act as a judge of the Chancery Division could be conferred⁵, but in that event he would only exercise an ancillary jurisdiction in aid of his jurisdiction as a nominated judge⁶.

1 As to the nominated judge see PARA 674 ante.

2 Eg to transfer funds in court standing to the credit of a claim proceeding in the Chancery Division (*Re Platt* (1887) 36 ChD 410, CA), or to direct the payment of costs incurred in opposing a Bill in Parliament which affected a patient's real estate (*Re Blake* (1895) 72 LT 280, CA). As to the Chancery Division of the High Court generally see COURTS vol 10 (Reissue) PARA 611.

3 As to the Court of Appeal generally see COURTS vol 10 (Reissue) PARA 634 et seq.

4 As to the power of nomination see the Mental Health Act 1983 s 93(1) (prospectively amended); and PARA 674 ante. The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

5 See the Supreme Court Act 1981 s 9(1), (2) (as amended; prospectively amended); and COURTS vol 10 (Reissue) PARA 519.

6 *Re Barber* (1888) 39 ChD 187, CA.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

679 Chancery jurisdiction in aid

NOTE 5--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(2) THE SPECIAL JUDICIARY AND THE COURT OF PROTECTION/680. Administration jurisdiction of Chancery Division.

680. Administration jurisdiction of Chancery Division.

When administering a trust, the Chancery Division¹ has, in some cases², exercised a discretion to authorise the property of a mentally disordered person, either capital² or income⁴ or both⁵, to be applied for his maintenance. The Chancery Division may intervene only if the property in question is small, the income from the property would all be used up in the patient's maintenance and there is already some money in court or some other proceeding⁶ giving the court control over the person's property⁷. The fact that a person suffers from mental disorder does not in itself give the Chancery Division any jurisdiction over that person's property⁸.

1 As to the Chancery Division of the High Court generally see COURTS vol 10 (Reissue) PARA 611.

2 For a review of the authorities see *Re K's Settlement Trusts* [1969] 2 Ch 1, [1969] 1 All ER 194, following *Re Grimmett's Trusts* (1887) 56 LJCh 419, applying *Vane v Vane* (1876) 2 ChD 124.

3 *Re Tuer's Will Trusts* (1886) 32 ChD 39, CA.

4 *Re Bligh* (1879) 12 ChD 364, CA; *Re Silva's Trusts* (1888) 57 LJCh 281; *Re Brandon's Trusts* (1879) 13 ChD 773; *Re T--* (1880) 15 ChD 78; *Re Carr's Trusts, Carr v Carr* [1904] 1 Ch 792, CA. See, however *Re Barker's Trusts* [1904] WN 13. As to the vesting of stock in a foreign curator see PARA 725 post.

5 *Re Tuer's Will Trusts* (1886) 32 ChD 39, CA.

6 The Chancery Division will not intervene if proceedings in the Court of Protection are contemplated: *Re K's Settlement Trusts* [1969] 2 Ch 1, [1969] 1 All ER 194; *Re Bligh* (1879) 12 ChD 364, CA; *Vane v Vane* (1876) 2 ChD 124.

7 *Re K's Settlement Trusts* [1969] 2 Ch 1, [1969] 1 All ER 194 per Megarry J (application to authorise dealings with trust fund when there were no proceedings in Court of Protection).

8 *Beall v Smith* (1873) 9 Ch App 85 at 92. As to conveyances on behalf of persons suffering from mental disorder see PARA 687 post.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(i) Persons in relation to whom the Powers apply/681. Persons in relation to whom the powers may be exercised.

(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION

(i) Persons in relation to whom the Powers apply

681. Persons in relation to whom the powers may be exercised.

The following provisions have effect until a day to be appointed¹. Under Part VII of the Mental Health Act 1983 the functions of the judge² are exercisable where, after considering medical evidence, he is satisfied³ that a person is incapable by reason of mental disorder⁴ of managing and administering his property⁵ and affairs⁶. For the purposes of Part VII of the Act, 'patient' means a person as to whom the judge is so satisfied⁷.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the judge see PARA 674 ante.

3 The fact that some other person or body is satisfied as to the patient's mental disorder does not affect the requirement that the court must consider the medical evidence, unless the person concerned is already subject to the jurisdiction of the court: *Re S (FG) (Mental Health Patient)* [1973] 1 All ER 273, [1973] 1 WLR 178, Ct of Protection.

4 For the meaning of 'mental disorder' see PARA 402 ante. The fact that a person is suffering from mental disorder is not of itself sufficient evidence of incapacity.

5 'Property' includes any thing in action, and any interest in real or personal property: Mental Health Act 1983 s 112. See also PARA 682 note 2 post.

6 Ibid s 94(2). As to the power of the Court of Protection to administer a minor's affairs see *M v Lester* [1966] 1 All ER 207n, [1966] 1 WLR 134 (damages recovered on behalf of a minor transferred to the Court of Protection). The Court of Protection has exclusive jurisdiction over all the property and all the affairs of the patient in all their aspects, but not the management or care of the patient's person: see *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545, HL (court had no jurisdiction over medical treatment); *Re W(EEM)* [1971] Ch 123 at 143, [1970] 2 All ER 502 at 511, Ct of Protection, per Ungood-Thomas J (Court of Protection did, however, have jurisdiction to conduct divorce proceedings on behalf of the patient). As to the principles to be applied when the court is identifying whether a patient is incapable of managing his affairs see *Masterman-Lister v Brutton & Co, Masterman-Lister v Jewell* [2002] EWCA Civ 1889, [2003] 3 All ER 162, [2003] 1 WLR 1511.

7 Mental Health Act 1983 ss 94(2), 112. Once a person has become a patient, the enactments specified in the third column of Sch 3 (as amended; prospectively repealed) (see also PARA 684 post), in so far as they make special provision for persons suffering from mental disorder, do not apply to him: s 113. The relevant enactments are the Inclosure Act 1773 ss 22, 24 (as amended); the Chelsea and Kilmainham Hospitals Act 1826 ss 44-48 (as amended and repealed for certain purposes); the Ecclesiastical Corporations Act 1832 s 3 (as amended and repealed for certain purposes); the Pluralities Act 1838 s 127 (as amended and repealed for certain purposes); the School Sites Act 1841 s 5 (as amended); the Ecclesiastical Houses of Residence Act 1842 s 12 (as amended and repealed for certain purposes); the Ecclesiastical Leasing Act 1842 s 24 (as amended and repealed for certain purposes); the Companies Clauses Consolidation Act 1845 s 79 (as amended); the Lands Clauses Consolidation Act 1845 s 9; the Inclosure Act 1845 s 20 (as amended); the Literary and Scientific Institutions Act 1854 s 5 (as amended); the Land Registry Act 1862 s 116 (repealed); the Improvement of Land Act 1864 s 24 (as amended); the Metropolitan Commons Act 1866 s 28 (as amended); the Compulsory Church

Rate Abolition Act 1868 s 7 (repealed for certain purposes); the Places of Worship Sites Act 1873 ss 1, 3 (as amended; repealed for certain purposes).

Cf the Court of Protection Rules 2001, SI 2001/824, r 2(1), in which the expression 'patient' includes a person who is alleged to be, or who the court has reason to believe may be, incapable by reason of mental disorder of managing and administering his property and affairs: see also PARA 684 post.

The definition of 'patient' in the Mental Health Act 1983 s 145(1) (see PARA 435 ante) applies to the other Parts of the Act. The adoption of a different definition in Pt VII (as amended; prospectively amended and repealed) lends emphasis to the fact that the jurisdiction, other than the jurisdiction in the case of an emergency (see PARA 684 post), rests on the judge first being satisfied concerning the actual existence of such incapacity as is mentioned in s 94(2): see *Re S (FG) (Mental Health Patient)* [1973] 1 All ER 273 at 275, [1973] 1 WLR 178 at 179, Ct of Protection. The existence of such incapacity is also the test whether a person is a patient for the purposes of the Civil Procedure Rules 1998, SI 1998/3132 (as amended) relating to disability (see CPR 2.3, CPR 21.1; and PARA 634 ante).

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

681 Persons in relation to whom the powers may be exercised

NOTE 6--Vulnerability to exploitation does not on its own lead to the conclusion that there is a lack of capacity: *Lindsay v Wood* [2006] EWHC 2895 (QB), [2006] All ER (D) 204 (Nov). See also *Re MM (an adult); A Local Authority v MM* [2007] EWHC 2003 (Fam), [2008] 3 FCR 788 (patient had capacity to consent to sexual relations but not to litigate, manage her finances, decide with whom to live or to marry).

NOTE 7--Chelsea and Kilmainham Hospitals Act 1826 and Ecclesiastical Houses of Residence Act 1842 further amended: Constitutional Reform Act 2005 Sch 11 paras 7, 8.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(ii) General Functions, Powers and Principles/682. General functions and principles.

(ii) General Functions, Powers and Principles

682. General functions and principles.

The following provisions have effect until a day to be appointed¹. With respect to the property and affairs of a patient³, the judge⁴ may do or secure the doing of all such things as appear necessary or expedient:

- 154 (1) for the maintenance or other benefit⁵ of the patient⁶;
- 155 (2) for the maintenance or other benefit of members of the patient's family⁷;
- 156 (3) for making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally disordered⁸; or
- 157 (4) otherwise for administering the patient's affairs⁹.

In the exercise of this jurisdiction, the leading principle and PARAMount consideration has always been the interest, benefit and requirements of the patient¹⁰. Hence in the exercise of the powers conferred¹¹ regard must be had first of all to the patient's requirements¹². The judge will apply the patient's estate, and if necessary change the condition of the property, for these paramount objects without regard to the interests of the patient's successors or any expectancies they may have in his estate¹³.

Further, the rules of law which restricted the enforcement by a creditor of rights against property under the control of the judge in lunacy apply to property under the control of the judge; subject to this and to the requirements of the patient, however, the judge must, in administering the patient's affairs, have regard to the interests of creditors¹⁴ and also to the desirability of making provision for obligations of the patient notwithstanding that they may not be legally enforceable¹⁵.

The normal method of protecting and making available the estate of a person subject to the court's powers is by the appointment of a receiver¹⁶. However, the judge may also exercise an emergency jurisdiction upon allegation of incapacity¹⁷. If a patient's estate is simple and straightforward, of comparatively low value and can be administered without a receiver, a 'short procedure' order may be granted¹⁸.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the meaning of 'property' see PARA 681 note 5 ante. It also includes papers held by the Official Solicitor in proceedings in which he acts as the patient's next friend (now 'litigation friend'): *Re E (Mental Health Patient)* [1985] 1 All ER 609, [1985] 1 WLR 245, CA (parents of a patient had no absolute right to see such papers, although they were the patient's property, but had to obtain the authority of the court to order disclosure of them as necessary or expedient for the benefit of the patient). As to the Official Solicitor see PARA 748 post.

3 For the meaning of 'patient' see PARA 681 note 7 ante.

4 As to the judge see PARA 674 ante.

5 'Benefit' is given a wide construction so as to include not merely what is financially or materially beneficial to a patient, but also the making of provision for obligations beyond those legally enforceable, which the patient, if of sound mind, would have fulfilled; and regard must also be had to the benefit of members of the patient's family: *Re W(EEM)* [1971] Ch 123 at 135-136, [1970] 2 All ER 502 at 505, Ct of Protection. The benefit of the patient, and of his family, is not confined to material benefit but extends to whatever may be meant by their true interests: *Re E (Mental Health Patient)* [1985] 1 All ER 609, [1985] 1 WLR 245, CA.

6 Mental Health Act 1983 s 95(1)(a).

7 Ibid s 95(1)(b). 'Family' connotes persons for all of whom the patient might prima facie be expected to make some provision; thus relatives such as nephews and nieces are not included: *Re DML* [1965] Ch 1133 at 1137, [1965] 2 All ER 129 at 131-132, Ct of Protection. See also *Re TB* [1967] Ch 247, [1966] 3 All ER 509, Ct of Protection, where an application was made under the Mental Health Act 1959 for a settlement of the patient's property to be made on his illegitimate son, who was not entitled to a settlement under the relevant provision as a member of the patient's family. See also *Re B* [2000] 1 All ER 665, [2000] 1 FCR 385, CA (as to whether a brain-damaged daughter could have assumed responsibility for the maintenance of her mother). As to the principles applicable in deciding allowances to relations out of a patient's estate see PARA 685 post. Applications for financial provision and property adjustment may, however, still be made in divorce and matrimonial proceedings: *CL v CFW* [1928] P 223; *Jones v Jones* [1985] QB 704, [1984] 3 All ER 1003, CA; and see PARA 615 ante; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 455.

8 Mental Health Act 1983 s 95(1)(c). See *Re C (a patient)* [1997] 1 FCR 501 (allocation of inherited fortune of severely mentally disabled patient); *Re S (gifts by mental patient)* [1997] 2 FCR 320, [1997] 1 FLR 96 (disposition of part of estate of elderly mental patient). As to the judge's powers in case of emergency see the Mental Health Act 1983 s 98; and PARA 684 post.

9 Ibid s 95(1)(d). As to the judge's power to direct the reimbursement of advances made by persons other than the patient for such purposes as are stated in the text see PARAS 683, 699 post. As to the power in certain cases to apply the pay and pensions of mentally disordered persons for such purposes as are stated in the text or for reimbursement see PARA 628 ante. As to the protection of persons acting under the Mental Health Act 1983 see PARA 407 ante.

10 *A-G v Marquis of Ailesbury* (1887) 12 App Cas 672 at 688, HL, per Lord Macnaghten.

11 Ie by the Mental Health Act 1983 s 95(1): see the text and notes 1-8 supra.

12 Ibid s 95(2). See *Re Plenderleith* [1893] 3 Ch 332, CA; *Re Winkle* [1894] 2 Ch 519, CA; *Re Pink* (1883) 23 ChD 577, CA; *A-G v Marquis of Ailesbury* (1887) 12 App Cas 672 at 688, HL, per Lord Macnaghten; *Awdley v Awdley* (1690) 2 Vern 192; *Ex p Marchioness of Annandale* (1749) Amb 80; *Ex p Grimstone* (1772) Amb 706; *Oxenden v Lord Compton* (1793) 2 Ves 69 at 72-73; *Re Badcock* (1839) 4 My & Cr 440; *Re Gist* [1904] 1 Ch 398 at 411, CA, per Sterling LJ; *Re Tye* [1900] 1 Ch 249, CA; *Re TRM (a person of unsound mind)* [1939] Ch 260 at 268, [1938] 4 All ER 194 at 198; *Re Debtor (No 1 of 1941)* [1941] Ch 487 at 493, [1941] 3 All ER 11 at 14, DC; *Re W(EEM)* [1971] Ch 123 at 136, [1970] 2 All ER 502 at 505, Ct of Protection.

13 *A-G v Marquis of Ailesbury* (1887) 12 App Cas 672 at 688, HL, per Lord Macnaghten, and at 683 per Lord Selborne; *Ex p Grimstone* (1772) Amb 706; *Oxenden v Lord Compton* (1793) 2 Ves 69 at 72-73; *Re Searle, Ryder v Bond* [1912] 2 Ch 365; *Re Silva, Silva v Silva* [1929] 2 Ch 198; cf *Ex p Marchioness of Annandale* (1749) Amb 80 at 81.

Where there is a substantial margin of funds not required for the patient's maintenance, regard will be had to the interests of the patient's estate on death and consideration will be given both to investment and to the effect of the current fiscal system.

14 Mental Health Act 1983 s 95(2). Subject to adequate means being available for the patient's maintenance, regard will be given to the just and proper claims of creditors: *Re Seager Hunt, Silicate Paint Co and JB Orr & Co Ltd v Hunt* [1906] 2 Ch 295; *Re Plenderleith* [1893] 3 Ch 332, CA; *Re Winkle* [1894] 2 Ch 519, CA. See further PARA 686 post.

15 Mental Health Act 1983 s 95(2).

16 See ibid s 99(1). Although the main function of the receiver is to receive the patient's income, the receiver may by order, direction or authority, be empowered to do all that is necessary in the proper conduct of the patient's affairs: see PARA 707 et seq post. A solicitor instructed by the receiver in connection with the patient's affairs is the solicitor of the patient and not that of the receiver, who is merely the statutory agent of the patient: *Re EG* [1914] 1 Ch 927, CA.

17 See the Mental Health Act 1983 s 98; and PARA 684 post.

18 See the Court of Protection Rules 2001, SI 2001/824, r 8 (as amended); and PARA 727 post.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(ii) General Functions, Powers and Principles/683. Specific powers of the judge.

683. Specific powers of the judge.

The following provisions have effect until a day to be appointed¹. Without prejudice to the general functions and principles², the judge³ may make such orders and give such directions and authorities as he thinks fit for the purposes of those functions⁴. In particular he may for those purposes make orders or give directions and authorities for:

- 158 (1) the control (with or without the transfer or vesting of property⁵ or the payment into or lodgment in the Supreme Court of money or securities) and management of any property of the patient⁶;
- 159 (2) the sale, exchange, charging or other disposition of or dealing with any property of the patient⁷;
- 160 (3) the acquisition of any property in the name of, or on behalf of, the patient⁸;
- 161 (4) the settlement of any property of the patient, or the gift of any property to members of the patient's family or to other persons, or for other purposes, for whom or which the patient might be expected to provide if he were not mentally disordered⁹;
- 162 (5) the execution for the patient of a will making any provision (whether by way of disposing of property or exercising a power or otherwise) which could be made by a will executed by the patient if he were not mentally disordered¹⁰;
- 163 (6) the carrying on by a suitable person of any profession, trade or business of the patient¹¹;
- 164 (7) the dissolution of a partnership of which the patient is a member¹²;
- 165 (8) the carrying out of any contract entered into by the patient¹³;
- 166 (9) the conduct of legal proceedings in the name of the patient or on his behalf¹⁴;
- 167 (10) the reimbursement out of the patient's property, with or without interest, of money applied by any person either in payment of the patient's debts (whether legally enforceable or not) or for the maintenance or other benefit of the patient or members of his family or in making provision for other persons or purposes for whom or which he might be expected to provide if he were not mentally disordered¹⁵;
- 168 (11) the exercise of any power (including the power to consent) vested in the patient, whether beneficially, or as a guardian or trustee, or otherwise¹⁶.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 See the Mental Health Act 1983 s 95; and PARA 682 ante. Any act or transaction must still be justified under one or other of the paragraphs of s 95(1) and satisfy the order of priorities laid down by s 95(2): *Re C (a patient)* [1991] 3 All ER 866 at 869.

3 As to the judge see PARA 674 ante.

4 Mental Health Act 1983 s 96(1). As to protection for acts done in pursuance of the Mental Health Act 1983 see PARA 407 ante.

5 As to the meaning of 'property' see PARA 681 note 5 ante.

6 Mental Health Act 1983 s 96(1)(a). As from a day to be appointed, s 96(1)(a) is amended so as to refer to Senior Courts instead of the Supreme Court: see s 96(1)(a) (prospectively amended by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 2 para 4(1), (3)). At the date at which this volume states the law no such day had been appointed.

As to the transfer of stock standing in the name of or vested in a patient see PARAS 724-725 post. For the meaning of 'patient' see PARA 681 note 7 ante. As to the Supreme Court generally see COURTS vol 10 (Reissue) PARA 501 et seq.

7 Mental Health Act 1983 s 96(1)(b). As to sale of the patient's property see PARA 688 post; as to exchange or partition see PARA 689 post; as to leasing property see PARA 690 post; as to the charging of property see PARA 691 post; as to the exercise of the powers of a tenant for life of settled land see PARA 701 post; as to conveyances etc on behalf of persons suffering from mental disorder see PARA 687 post. As to the exercise on behalf of a patient of a power to accept a devise subject to an onerous condition see PARA 701 post.

8 Ibid s 96(1)(c). As to the preservation of interests in the patient's property see PARA 746 post.

9 Ibid s 96(1)(d). See PARAS 692-694 post.

10 Ibid s 96(1)(e). 'Will' includes a codicil: s 112. As to the supplementary provisions as to wills executed under this provision see s 97; and see further PARAS 695-696 post.

11 Ibid s 96(1)(f). See PARA 697 post.

12 Ibid s 96(1)(g). It is rarely necessary to invoke this power as partnerships are usually dissolved by consent; it is unlikely that an order would be made where there are disputes as to accounts or otherwise, but, if necessary, the receiver would be authorised to proceed in the Chancery Division: see PARA 607 ante. As to the Chancery Division of the High Court see COURTS vol 10 (Reissue) PARA 611.

13 Ibid s 96(1)(h). See PARA 698 post.

14 Ibid s 96(1)(i). See PARA 703 post.

15 Ibid s 96(1)(j). See PARA 699 post. As to the position of creditors see PARA 686 post. As to the power of certain authorities to apply a patient's pay or pension for such purposes as are stated in the text or for reimbursement see PARA 628 ante.

16 Ibid s 96(1)(k). As to the exercise of powers vested in patients see generally para 701 post. As to the power to appoint trustees and trusts generally see PARAS 626 ante, 718 et seq post. As to the sale etc of land of which the patient is tenant for life see PARA 687 post. As to the exercise of the power of ecclesiastical patronage see PARA 702 post.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

683 Specific powers of the judge

NOTE 6--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(ii) General Functions, Powers and Principles/684. Judge's powers in cases of emergency.

684. Judge's powers in cases of emergency.

The following provisions have effect until a day to be appointed¹. Where it is represented to the judge² and he has reason to believe³ that a person⁴ may be incapable, by reason of mental disorder⁵, of managing and administering his property and affairs, and the judge is of the opinion that it is necessary to make immediate provision for certain matters⁶, he may, pending the determination of the question of incapacity, exercise in relation to that person's property and affairs any of the powers conferred on him in relation to a patient's property and affairs so far as is requisite for enabling that provision to be made⁷. An interim receiver may also be appointed⁸.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the judge see PARA 674 ante.

3 Cf the Mental Health Act 1983 s 94(2), which requires the judge to be satisfied 'after considering medical evidence': see PARA 681 ante.

4 Ie not a 'patient' as defined in the Mental Health Act 1983 s 94(2): see PARA 681 ante.

5 For the meaning of 'mental disorder' see PARA 402 ante.

6 Ie any of the matters mentioned in the Mental Health Act 1983 s 95: see PARA 682 ante.

7 Ibid s 98. Once such powers have been exercised the enactments specified in the third column of Sch 3 (amended by the Statute Law (Repeals) Act 1998; and the Statute Law (Repeals) Act 2004), in so far as they make special provision for persons suffering from mental disorder, do not have effect in relation to the person concerned: Mental Health Act 1983 s 113. See also PARA 681 note 7 ante. Schedule 3 is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day to be appointed under s 68. At the date at which this volume states the law no such day had been appointed. See note 1 supra.

As to the notification of parties in an emergency see *Re Davey* [1980] 3 All ER 342, [1981] 1 WLR 164, Ct of Protection (deputy master had not erred in failing to give husband or relatives notice of execution of will where patient elderly and in poor health). In the event that the patient survives, the practice is to give notice to the parties affected by the statutory will immediately after the hearing so that they have an opportunity to make a further application if time permits. As to the power of the judge to execute a statutory will see PARAS 695-696 post.

8 See the Court of Protection Rules 2001, SI 2001/824, r 42. As to the definition of 'patient' in those rules see PARA 681 note 7 ante. The rules are made under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) (see note 1 supra), and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). Cf the definition in the Mental Health Act 1983 ss 94, 112: see PARA 681 ante.

As to the appointment of an interim receiver see PARA 704 post. The appointment of such a receiver usually only becomes necessary in order to safeguard the patient's estate and interests: *Re Pountain* (1888) 37 ChD 609, CA (interim receiver appointed to protect the estate from creditors).

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(ii) General Functions, Powers and Principles/685. Allowances to relations.

685. Allowances to relations.

In deciding whether to make an allowance out of a patient's estate to relations or for other persons or purposes for whom or for which he is not bound to provide, the court is guided by the consideration of what the patient¹ himself would probably have done if he were not mentally disordered². Assuming the existence of an ample margin beyond the patient's personal requirements, the continuation of allowances, originated by him, to those to whom he stands in loco parentis is authorised almost as a matter of course; and in a proper case the court would itself originate such allowances³. Further than this, allowances to other near relations, such as collaterals, and other payments may be made where special claims for consideration can be put forward⁴. It has been said that it is not the duty of the court to deal benevolently or charitably with the patient's surplus income⁵, and that the tendency should be towards narrowing rather than augmenting voluntary allowances⁶. However, the modern practice is to exercise reasonable generosity in making allowances out of surplus income, particularly where by the use of covenants the net cost to the patient's estate is considerably less than the benefit received by the relation⁷.

Where allowances have been ordered to be made to relations and to be treated as advancements on account of the shares, if any, of the recipients under the patient's will and to be brought into hotchpot, the Chancery Division⁸, in administering the estate on the patient's death, proceeds on the principle that it would be against good conscience not to give effect to such orders, but the court may in its discretion refuse to enforce them if the circumstances have so altered that to enforce the orders will produce not the equality anticipated, but an inequality greater than if they were not enforced⁹.

¹ For the meaning of 'patient' see PARA 681 ante.

² *Re Hinde, ex p Whitbread* (1816) 2 Mer 99; *Re Frost* (1870) 5 Ch App 699; *Re DML* [1965] Ch 1133, [1965] 2 All ER 129, Ct of Protection; *Re L (WJG)* [1966] Ch 135, [1965] 3 All ER 865, Ct of Protection. As to the judge's power to order the reimbursement of advances made by third persons for the benefit of the patient's family or other persons for whom the patient might be expected to provide see PARA 699 post. As to the application of the pay and pensions of mentally disordered persons for the benefit of their families or the reimbursement of advances see PARA 628 ante.

The judge must first be satisfied that the proposed transaction is within the ambit of the Mental Health Act 1983 s 95: see PARAS 682-683 ante. The saving of inheritance tax is not of itself sufficient: *Re CWM* [1951] 2 KB 714, [1951] 2 All ER 707, CA (but see PARA 694 post).

The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

³ Where an order is made directing payment of sums by way of allowance to the patient's children, the children are in no better position than they would have been if the allowances had been voluntary allowances made to them by their parent, if capable, and the payment of such allowances is terminated by the patient's death: *Re Bennett, Greenwood v Bennett* [1913] 2 Ch 318 at 325-326. See also note 4 infra. As to the position where allowances are ordered to be treated as advancements see note 9 infra.

⁴ *Re Sparrow* (1882) 20 ChD 320, CA; *Re Blair* (1836) 1 My & Cr 300; *Re Croft* (1862) 32 LJCh 481; *Re Beridge* (1884) 50 LT 653. Allowances have been made to a daughter on her marriage, including a special allowance to her by way of outfit and for her settlement (*Re Fowler, ex p Fowler* (1842) 6 Jur 431; *Re Drummond* (1836) 6 LJCh 58); to a nephew who was heir-at-law and one of the next of kin (*Re Sparrow* supra); to collaterals (*Re Blair* supra; *Re Croft* supra); to a patient's mistress (*Re HMC* (1938) unreported); cf *Bradshaw v Bradshaw*

(1820) 1 Jac & W 647); to an old servant as a retiring pension (*Re Earl of Carysfort* (1840) Cr & Ph 76); for the erection of a church and parochial schools in the immediate neighbourhood of the patient's real estate (*Re Strickland* (1871) 6 Ch App 226); and in discharge of a moral obligation treated as a debt of honour (*Re Whitaker* (1889) 42 ChD 119, CA).

5 *Re Darling* (1888) 39 ChD 208, CA.

6 *Re Darling* (1888) 39 ChD 208, CA; *Re Clarke* (1847) 2 Ph 282; *Re Evans* (1882) 21 ChD 297, CA.

7 le by virtue of the fact that the allowance covenanted to be paid is excluded in the computation of the patient's total income and that the relation can claim reliefs from tax in respect of the allowance. As to reliefs generally see INCOME TAXATION vol 23(2) (Reissue) PARA 951 et seq.

8 As to the Chancery Division of the High Court see COURTS vol 10 (Reissue) PARA 611.

9 *Re Merrill, Greener v Merrill* [1924] 1 Ch 45, where all the orders were made on the application of the receiver in the absence of any of the interested parties, although with their knowledge and approval, and it was held that having regard to all the circumstances the least inequality would be effected by ignoring the orders in toto. If the orders had been made in the presence and with the consent of the parties beneficially interested, it seems that the circumstances would then have imposed a legal obligation on the recipients of the allowances to account on the death of the patient for the sums so advanced: *Re Merrill, Greener v Merrill* supra at 58. As to the effect of death on allowances to children generally see note 3 supra.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(ii) General Functions, Powers and Principles/686. Interests of creditors.

686. Interests of creditors.

The following provisions have effect until a day to be appointed¹. Subject to the rules of law restricting the enforcement by a creditor of rights against property² under the control of the judge³, the judge must, in administering a patient's affairs, have regard to creditors' interests and also to the desirability of making provision for obligations of the patient⁴, notwithstanding that they may not be legally enforceable; but in exercising these powers regard must be had first of all to the requirements of the patient⁵.

Once the patient's property has become subject to the jurisdiction of the judge, creditors are without remedy; they cannot obtain any payment unless the judge makes an order in their favour, and, if they apply, an order may be made or refused to all or any in his discretion⁶. Where necessary for the due protection of the property in this sense, the judge will make an order for bringing it into court⁷. However, creditors who have obtained judgment before incapacity will not be deprived of their rights by the incapacity if execution has been levied before the patient has become subject to the jurisdiction of the judge⁸.

In the case of funds in the custody of the court, charging orders in the High Court are, in the interests of creditors, to be recommended, since on the death of the patient they become operative on the estate as it then exists⁹. Such an order can, of course, in no way prejudice the judge's power to have recourse at any time during the incapacity to the patient's property so charged for any purposes beneficial to the patient¹⁰.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the meaning of 'property' see PARA 681 note 5 ante.

3 As to the judge see PARA 674 ante.

4 For the meaning of 'patient' see PARA 681 ante.

5 Mental Health Act 1983 s 95(2); *Re Price* (1887) 34 ChD 603, CA; *Re Plenderleith* [1893] 3 Ch 332, CA; *Re Pink* (1883) 23 ChD 577, CA; *Re Winkle* [1894] 2 Ch 519, CA. As to the power of the judge to authorise payment of debts and reimbursement of maintenance see further PARA 699 post. As to the power of certain authorities to apply a patient's pay or pension in reimbursement see PARA 628 ante.

6 *Re Seager Hunt, Silicate Paint Co and JB Orr & Co Ltd v Hunt* [1906] 2 Ch 295 at 299 per Buckley J; and see *Re Pink* (1883) 23 ChD 577, CA.

7 *Re Winkle* [1894] 2 Ch 519, CA.

8 *Re Clarke* [1898] 1 Ch 336, CA; and see *Davies v Thomas* [1900] 2 Ch 462, CA.

9 *Re Leavesley* [1891] 2 Ch 1, CA; and see also CONTRACT vol 9(1) (Reissue) PARA 758. The High Court has no power to make an order providing that the amount to be charged is to be determined in the Court of Protection: see PARA 640 ante. As to the judge's power of charging of a patient's property see PARA 691 post.

10 *Re Plenderleith* [1893] 3 Ch 332, CA; *Re Pink* (1883) 23 ChD 577, CA; *CL v CFW* [1928] P 223.

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SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iii) Specific Powers/687. Special rules as to conveyances etc on behalf of persons suffering from mental disorder.

(iii) Specific Powers

687. Special rules as to conveyances etc on behalf of persons suffering from mental disorder.

Where a legal estate¹ in land² (whether settled³ or not) is vested in a person suffering from mental disorder⁴, either solely or jointly with any other person or persons, his receiver⁵ or (if no receiver is acting for him) any person authorised in that behalf⁶ must under an order of the authority having jurisdiction under Part VII of the Mental Health Act 1983⁷, or of the court⁸, or under any statutory power, make or concur in making all requisite dispositions for conveying⁹ or creating a legal estate in his name and on his behalf¹⁰.

1 For the meaning of 'legal estate' for this purpose see the Law of Property Act 1925 ss 1(1), (2), (4), 205(1)(x) (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARAS 2, 45-47.

2 As to the meaning of 'land' see *ibid* s 205(1)(ix) (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARAS 76-77.

3 As to the exercise of the powers of a tenant for life of settled land see PARA 701 post.

4 'Mental disorder' has for this purpose the meaning assigned by the Mental Health Act 1983 s 1(2) (see PARA 402 ante); and 'receiver', in relation to a person suffering from mental disorder, means a receiver appointed for that person under Pt VII (ss 93-113) (as amended; prospectively amended and repealed): Law of Property Act 1925 s 205(1)(xiii) (substituted by the Mental Health Act 1959 s 149(1), Sch 7 Pt I; and amended by the Mental Health Act 1983 s 148(1), Sch 4 para 5(b)). The Law of Property Act 1925 s 205(1)(xiii) (as amended) is repealed by the Mental Capacity Act 2005 s 67(1), (2), Sch 6 para 4(1), (3), Sch 7 as from a day to be appointed under s 68(1). At the date at which this volume states the law no such day had been appointed. See also note 7 *infra*.

5 As to the power to appoint receivers see PARA 704 et seq post.

6 As to the authorisation of a person to deal with the patient's property see PARA 704 post.

7 *Ie* the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended). As to the construction of references to the authority see PARA 675 ante. Part VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

8 *Ie* the High Court or, where it has jurisdiction, the county court: see the Law of Property Act 1925 s 203(3) (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 188.

9 The terms 'convey' and 'disposition' are defined in the Law of Property Act 1925 s 205(1)(ii): see REAL PROPERTY vol 39(2) (Reissue) PARA 232.

10 *Ibid* s 22(1) (substituted by the Mental Health Act 1959 Sch 7 Pt I; and amended by the Mental Health Act 1983 Sch 4 para 5(a)). As from a day to be appointed, the Law of Property Act 1925 s 22(1) (as substituted and amended) is further amended so as to refer to a person lacking capacity under the Mental Capacity Act 2005 to convey a legal estate or a deputy appointed by the Court of Protection instead of a person suffering from a mental disorder or receiver by a reference, and so as to refer to the Court of Protection instead of the relevant authority: see the Law of Property Act 1925 s 22(1) (prospectively amended by the Mental Capacity Act 2005 s 67(1), (2), Sch 6 para 4(1), (3), Sch 7). At the date at which this volume states the law no such day or days had been appointed. See also note 7 *supra*.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

687 Special rules as to conveyances etc on behalf of persons suffering from mental disorder

NOTE 7--Day now appointed: SI 2007/1897.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iii) Specific Powers/688. Sales of property.

688. Sales of property.

When a sale of a patient's¹ property is directed or authorised², it is not essential that the sale should be made for a cash consideration³. For example, the sale of freeholds may be in consideration of a perpetual rentcharge⁴. Where the patient has a life interest in a fund over which he has a general power of appointment, an order may be made for the sale of the fund without prejudice to any question which may arise if the patient subsequently appoints⁵. Where a patient is tenant for life of land, his statutory power of sale may be exercised by a person authorised for the purpose⁶.

When freehold or leasehold⁷ property is to be sold⁸, the usual practice is for an order to be obtained directing or authorising the sale subject to the approval of the Court of Protection⁹. If the sale is to be by private treaty, a single clean copy of the assurance as agreed by all the parties is sent to the Court of Protection for settlement and approval, accompanied by a photocopy of the original contract signed by the purchaser¹⁰. If the sale is to be by auction, the reserve is fixed by the court based on evidence of value and will be forwarded to the auctioneer in a sealed envelope to be opened at the time of sale and not before.

If a patient's property is to be acquired under compulsory powers, an order for sale can be made to carry the sale into effect¹¹. When land compulsorily taken is subject to a rentcharge in favour of a patient during his life, the receiver may be authorised to release the land from the rentcharge on the purchaser buying, in the patient's name, a government annuity of the same yearly value for his life¹².

Any person who would on the patient's death have taken an interest in property sold will take a like interest if and so far as circumstances allow in the proceeds of sale¹³.

1 For the meaning of 'patient' see PARA 681 ante.

2 As to the power of the judge to direct or authorise a sale see the Mental Health Act 1983 s 96(1)(b); and PARA 683 ante. Part VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

3 Subject to any necessary adaptation, the special conditions which are set out in the relevant form (obtainable from the Court of Protection) should be inserted as terms of the contract, as well as any clause relating to a covenant for indemnity in respect of restriction or other covenants. As to urgent sale pending appointment of a receiver see PARA 684 ante.

4 *Re Ware* [1892] 1 Ch 344, CA.

5 *Re Hirst (No 2)* (1893) 68 LT 557, CA. As to the exercise of powers vested in the patient as trustee or guardian see PARA 701 post.

6 As to the powers in relation to settled land see PARA 701 post.

7 Information as to whether the vendor has fully complied with the covenants in the lease will be required. As to assignment on sale of leasehold property see the Law of Property Act 1925 s 77(1) (as amended); the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13) (as amended); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 969 et seq; SALE OF LAND vol 42 (Reissue) PARAS 302-303, 337, 349-350.

8 Before making an order authorising the sale of the patient's home, the court will usually require to be satisfied that there is no prospect in the foreseeable future of his being able to reside there, and further that he will not be unduly distressed by knowledge of the sale.

9 In exceptional circumstances, a sworn affidavit of value by a qualified valuer will be required. As to the Court of Protection see PARA 676 ante.

10 The settled draft will be retained by the court. The engrossment should not be executed until it has been sealed by the court. The seal of the court on any deed or other document is evidence that it has been approved by the court. See the Court of Protection Rules 2001, SI 2001/824, r 90. The rules are made under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) (see note 2 supra), and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post).

11 le under the Mental Health Act 1983 s 96(1)(b): see PARA 683 ante.

12 *Re Brewer* (1875) 1 ChD 409, CA.

13 See the Mental Health Act 1983 s 101(1); and PARA 746 post.

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SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iii) Specific Powers/689. Power of exchange or partition.

689. Power of exchange or partition.

The following provisions have effect until a day to be appointed¹. An order may be made authorising the exchange of any property of the patient² either with or without minerals³. Any person who would on the patient's death have taken an interest in the property exchanged will take a like interest, if and so far as the circumstances allow, in the property taken in exchange⁴. The power of a tenant for life to exchange settled land may be exercised on behalf of a tenant for life who is a patient by a person authorised for the purpose⁵.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 See the Mental Health Act 1983 s 96(1)(b); and PARA 683 ante. For the meaning of 'patient' see PARA 681 ante.

3 *Re Dicconson* (1880) 15 ChD 316, CA.

4 See the Mental Health Act 1983 s 101(3); and PARA 746 post.

5 As to the powers in relation to settled land see PARA 701 post.

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674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iii) Specific Powers/690. Power of leasing.

690. Power of leasing.

The following provisions have effect until a day to be appointed¹. Authority may be given for the granting of a lease of any property of a patient² under the judge's general power to authorise dispositions of property³. Where a patient is tenant for life of land, his statutory power of leasing may be exercised by a person authorised for the purpose⁴.

It is contrary to the usual practice of the court to confer upon a receiver a general power of leasing (other than for periods not exceeding three years) although this is occasionally done where the estate comprises a large number of properties and the absence of such a power would entail numerous orders of a similar nature. If the receiver exceeds his authority, he may be liable personally in respect of any insufficiency in the rent receivable and for any costs occasioned by his conduct⁵. When it is expedient, the judge will exercise the discretion of a landlord in giving preference to an old tenant and in not being governed entirely by the highest offer⁶, but ought on behalf of the patient do what a just and reasonable owner would do⁷. Relief against forfeiture on breach of a covenant to repair may be granted to a tenant⁸. Application for sanction to the renewal of a lease⁹ or to a reduction of rent must be made by the receiver. Application for abatement should be made by the receiver and not by the tenant¹⁰.

The receiver may also be authorised to surrender any lease and accept a new lease, which will be held subject to the same trusts, incumbrances and conditions as the surrendered lease¹¹.

The receiver cannot maintain a claim for rent accrued due after the patient's death, even though reserved by the lease granted by himself on behalf of the patient in which the lessee covenanted with him as receiver for payment¹².

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 For the meaning of 'patient' see PARA 681 ante.

3 See the Mental Health Act 1983 s 96(1)(b); and PARA 683 ante. As to the power, apart from statute, to grant the right to work minerals in the land of a person suffering from mental disorder see *Ex p Tabbert* (1801) 6 Ves 428; and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 363. As to mining leases see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 321 et seq. In the case of a tenant for life who is under mental disability, a lease of an easement can be granted by virtue of the combined effect of the Settled Land Act 1925 s 41 (see SETTLEMENTS vol 42 (Reissue) PARA 837) and the Mental Health Act 1983 s 96(1)(k) (see PARA 683 ante).

4 As to the powers in relation to settled land see PARA 701 post.

5 *Re Wilkins, ex p Wilkins, ex p Jenvey* (1842) 6 Jur 308.

6 *Re Ball* (1828) 1 Mol 141.

7 *Re Wynne* (1872) 7 Ch App 229; and see *Foster v Marchant* (1684) 1 Vern 262.

8 *Re Edridge, ex p Vaughan* (1823) Turn & R 434.

9 *Re Earl of Kilkeny* (1845) 7 I Eq R 594.

10 *Re Fitch* (1830) 1 Russ & M 354.

11 As to the provision for the preservation of the interest of any person who would on the patient's death have taken an interest in property disposed of see PARA 746 post.

12 *Foot v Leslie* (1885) 16 LR Ir 411.

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SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iii) Specific Powers/691. Charging of property.

691. Charging of property.

The following provisions have effect until a day to be appointed¹. Authority may be given for the charging² or other disposition or dealing with any property of a patient³.

Where the judge⁴ has ordered, directed or authorised the expenditure of money for the carrying out of permanent improvements on, or otherwise for the permanent benefit of, any property⁵ of a patient, he may order that the whole or any part of the money expended or to be expended is to be a charge on the property whether with or without interest at a specified rate, provided that no right of sale or foreclosure during the patient's lifetime is conferred by it⁶. The charge may be made in favour of such person as may be just, and in particular, where the money charged is paid out of the patient's general estate, in favour of a person as trustee for the patient⁷. Where an order has been made charging property with the cost of permanent improvements⁸, the order may also provide for excluding or restricting the provisions⁹ for preservation of the interests of other persons in the patient's property¹⁰. An estate of which the patient is tenant for life cannot be charged with money expended on an estate of which he is tenant in tail¹¹.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 In *Re Fox* (1886) 33 ChD 37, CA, where money to pay debts of an ancestor was raised by mortgage of land descended from him, no covenant for payment was entered into on behalf of the patient; but see *Re Ray* [1896] 1 Ch 468 at 472, CA. As to covenants in mortgages see MORTGAGE vol 32 (2005 Reissue) PARAS 408, 423, 433, 632-633.

3 See the Mental Health Act 1983 s 96(1)(b); and PARA 683 ante. As to the reimbursement of money applied in payment of a patient's debts and the repayment of advances for maintenance see PARA 699 post.

Orders giving persons a charge on the patient's property for sums owing to them are not subject to revenue duty: *Practice Note* [1922] WN 75. In the absence of particular circumstances an application to raise a sum for future maintenance made in the interests of the patient's relations rather than in his own interest will be refused: *Re Pugh* (1853) 3 De G M & G 416.

4 As to the judge see PARA 674 ante.

5 As to the meaning of 'property' see PARA 681 note 5 ante.

6 Mental Health Act 1983 s 101(5), (6). Such a charge does not create any right of sale or foreclosure during the patient's lifetime: s 101(6).

7 Ibid s 101(6).

8 Ie under ibid s 101(5).

9 Ie ibid s 101(5), (6): see PARA 746 post.

10 Ibid s 101(5), (6).

11 *Re Vavasour* (1885) 29 ChD 306, CA.

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Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iii) Specific Powers/692. Settlement of patient's property.

692. Settlement of patient's property.

The following provisions have effect until a day to be appointed¹. The judge² is empowered to direct that any property of a patient³ be disposed of by way of settlement to any members of his family or to other persons or purposes for whom or for which he might be expected to provide if he were not mentally disordered⁴. If a settlement is directed, the judge may also make, as respects the property settled, such consequential vesting or other orders as the case may require⁵.

Where a receiver has been appointed of a husband against whom a decree of dissolution of marriage has been made, the jurisdiction to direct a settlement may afford an alternative means of securing to the wife the permanent maintenance which the court in the matrimonial proceedings has power to order⁶.

Provision is made as to the procedure for making applications for settlements and other similar dealings⁷.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the judge see PARA 674 ante.

3 For the meaning of 'patient' see PARA 681 ante.

4 Mental Health Act 1983 s 96(1)(d). In considering whether such a settlement is of a nature that the patient would wish to make if competent to manage his affairs, the judge must assume that the patient has become sane for sufficient time to review the situation, knowing that after such brief interval of sanity he will become as he was before: *Re L (WJG)* [1966] Ch 135 at 144, sub nom *Re WJGL* [1965] 3 All ER 865 at 871-872, Ct of Protection; *Re DML* [1965] Ch 1133, [1965] 2 All ER 129, Ct of Protection; *Re RHC* [1963] 1 All ER 524, [1963] 1 WLR 1095, Ct of Protection; *Re TB* [1967] Ch 247, [1966] 3 All ER 509, Ct of Protection. See also *Re Freeman* [1927] 1 Ch 479, CA; *Re Lowdell* (1934) unreported (both cases decided under the Law of Property Act 1925 s 171 (repealed)).

5 See the Mental Health Act 1983 s 96(2); and PARA 723 post. As to the taxation of costs see *Re CEFD* [1963] 1 All ER 685, [1963] 1 WLR 329, Ct of Protection.

6 *CL v CFW* [1928] P 223 at 225. As to the power to order financial provision and property adjustment in matrimonial proceedings where the respondent is mentally disordered see PARA 615 ante; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 590. As to the power to order financial provision in divorce proceedings see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 553 et seq.

7 Court of Protection Procedure Note PN9. The procedure note is revised from time to time and the latest edition may be obtained from the court.

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693. Variation of a settlement.

The following provisions have effect until a day to be appointed¹. If a settlement of a patient's² property has been made pursuant to the statutory jurisdiction³ and the Lord Chancellor or a nominated judge⁴ is satisfied, at any time before the patient's death, that any material fact was not disclosed when the settlement was made, or that there has been any substantial change in circumstances, he may direct the settlement to be varied in such manner as he thinks fit and give any consequential directions⁵.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 For the meaning of 'patient' see PARA 681 ante.

3 See PARAS 683, 692 ante.

4 As to the nominated judge see PARA 674 ante. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

5 Mental Health Act 1983 s 96(3). As from a day to be appointed, s 96(3) is amended so as to omit the reference to the Lord Chancellor: see s 96(3) (prospectively amended by the Constitutional Reform Act 2005 ss 15(1), 146, Sch 4 Pt 1 paras 150, 153, Sch 18 Pt 2). At the date at which this volume states the law no such day had been appointed.

The Mental Health Act 1983 s 96(3) (prospectively amended) does not use the word 'revoke'; it simply confers a power to vary the trusts of a settlement in respect of property existing at the time of variation, and it does not prohibit the court's power to authorise the distribution during the patient's lifetime of capital to beneficiaries pursuant to the declared trusts and powers of a settlement: see *Re CWHT* [1978] Ch 67, [1978] 1 All ER 210, Ct of Protection. See also *Re RHC* [1963] 1 All ER 524, [1963] 1 WLR 1095, Ct of Protection.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

693 Variation of a settlement

NOTE 5--Day now appointed: SI 2006/1014.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iii) Specific Powers/694. Gift of a patient's property.

694. Gift of a patient's property.

The following provisions have effect until a day to be appointed¹. The judge² is empowered to direct that any property of the patient³ be disposed of by way of gift to any members of his family or to other persons or purposes for whom or for which he might be expected to provide if he were not mentally disordered⁴. This power is a useful alternative to the power of directing a settlement⁵; for example, on the marriage of a patient's child it may be preferable to direct that the disposition be by way of gift rather than by way of settlement.

The court will not countenance gifts primarily intended to avoid means-tested maintenance charges. However, applications within the purposes mentioned but with fiscal and tax planning advantages are considered sympathetically by the court.

Provision is made as to the procedure for making applications for gifts and other similar dealings⁶.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the judge see PARA 674 ante.

3 For the meaning of 'patient' see PARA 681 ante.

4 Mental Health Act 1983 s 96(1)(d). In considering if such a gift is of a nature that the patient would wish to make if competent to manage his affairs, the judge must assume that the patient has become sane for sufficient time to review the situation, knowing that after such brief interval of sanity he will become as he was before: *Re L(W/G)* [1966] Ch 135 at 144, sub nom *Re WJGL* [1965] 3 All ER 865 at 871-872, Ct of Protection. The judge must also consider if the proposed gift is one that the patient would be expected to provide if competent to manage his own affairs and removed from all influences which may have been brought to bear on him: *Re CMG* [1970] Ch 574, [1970] 2 All ER 740n, Ct of Protection. As to undue influence in relation to gifts see GIFTS vol 52 (2009) PARAS 212, 259; and see also MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 839 et seq. In making lifetime gifts for a patient who has never had testamentary capacity the judge should act as if the patient were a normal, decent person acting in accordance with contemporary standards of morality: *Re C (a patient)* [1991] 3 All ER 866.

5 See PARAS 683, 692 ante.

6 Court of Protection Procedure Note PN9. The procedure note is revised from time to time and the latest edition may be obtained from the court.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iii) Specific Powers/695. Drafting a statutory will.

695. Drafting a statutory will.

The following provisions have effect until a day to be appointed¹. The judge² may make or give an order, direction or authority for the execution for a patient³ of a will or a codicil⁴ which amends an existing will⁵. This power is not exercisable at any time when the patient is a minor, and must not be exercised unless the judge has reason to believe that the patient is incapable of making a valid will for himself⁶.

An order for the execution for the patient of a will is made on application⁷ by the receiver for the patient⁸, or by any person who made an application for the appointment of a receiver which has not yet been determined⁹, or by any person who, under any known will of the patient or under his intestacy, may become entitled to any property of the patient or any interest in it¹⁰, or any person for whom the patient might be expected to provide if he were not mentally disordered¹¹, or any attorney acting under a registered enduring power of attorney¹², or any other person whom the court may authorise to make it¹³.

The Vice-Chancellor has stated¹⁴ that the principles or factors which the court should have in mind when deciding what provisions to insert in a statutory will should be as follows:

- 169 (1) the patient should be assumed to have a brief lucid interval at the time the will was made;
- 170 (2) during that lucid interval it should be assumed that the patient has full knowledge of the past and realises that as soon as the will is executed he will lapse back into his pre-existing mental state;
- 171 (3) the actual patient must be considered, with all his antipathies and affections that he had while in full capacity, and not a hypothetical patient;
- 172 (4) the patient must be assumed to be acting reasonably and to have been advised by a competent solicitor; and
- 173 (5) in normal cases he is to be envisaged as taking a broad brush to the claims on his bounty rather than an accountant's pen.

In the case of a patient who has lacked testamentary capacity since birth the judge must assume that the patient would have been a normal decent person, acting in accordance with contemporary standards of morality¹⁵.

Provision is made as to the procedure for making applications for the execution of statutory wills and codicils and other similar dealings¹⁶.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the judge see PARA 674 ante.

3 For the meaning of 'patient' see PARA 681 ante.

4 As to the meaning of 'will' see PARA 683 note 10 ante.

5 Mental Health Act 1983 ss 96(1)(e), 97. The judge may direct the execution of a will making any provision, whether by way of disposing of property or exercising a power or otherwise, which could be executed by the

patient if he were not mentally disordered, eg merely revoking the whole or part of a former will or appointing a new executor or appointing a testamentary guardian of a minor.

6 Ibid s 96(4).

7 Court of Protection Rules 2001, SI 2001/824, r 18; *Practice Direction* [1983] 3 All ER 255, sub nom *Practice Note* [1983] 1 WLR 1077. The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) (see note 1 supra), and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post).

8 Court of Protection Rules 2001, SI 2001/824, r 18(a). Except as mentioned in r 18(c), (d), (e) and (f) (see the text to notes 11-13 infra), an application on behalf of a patient for whom a receiver has been appointed must, unless the court otherwise directs, be made by a receiver in his own name: r 12(1) (amended by SI 2001/2977). Subject to any directions given by the court, a patient for whom a receiver has been appointed may be represented by the receiver at any hearing relating to the patient or of which the patient has been given notice: Court of Protection Rules 2001, SI 2001/824, r 12(2). As to the meaning of 'patient' in the Court of Protection Rules 2001, SI 2001/824 (as amended) see PARA 681 note 7 ante.

9 Ibid r 18(b).

10 Ibid r 18(c).

11 Ibid r 18(d).

12 Ibid r 18(e). As to enduring powers of attorney see AGENCY vol 1 (2008) PARA 194 et seq. As to lasting powers of attorney under the Mental Capacity Act 2005 ss 9-14 (not yet in force) see PARAS 599, 647, 673 ante. See also note 1 supra.

13 Court of Protection Rules 2001, SI 2001/824, r 18(f). Where in any proceedings the court considers that the interests of a patient for whom a receiver has been appointed are not adequately represented by the receiver, the court may if he consents direct that the Official Solicitor act as solicitor for the patient either generally in the proceedings or for any particular purpose connected with the proceedings, except that it is not necessary to appoint the Official Solicitor to be receiver or litigation friend (formerly 'guardian ad litem') for the patient: r 13. As to the Official Solicitor see PARA 748 post.

14 *Re D(J)* [1982] Ch 237, [1982] 2 All ER 37 per Megarry V-C (applying *Re DML* [1965] Ch 1133, [1965] 2 All ER 129, Ct of Protection; *Re L(W/G)* [1966] Ch 135, sub nom *Re WJGL* [1965] 3 All ER 865, Ct of Protection).

15 *Re C (a patient)* [1991] 3 All ER 866 at 870 per Hoffmann J.

16 Court of Protection Procedure Note PN9. The procedure note is revised from time to time and the latest edition may be obtained from the court. As to those who should be notified of an application see *Re B* [1987] 2 All ER 475, [1987] 1 WLR 552. In the ordinary case and in the absence of emergency (see PARA 684 ante) or need to act with great speed or some other compelling reason, all persons who may be materially or adversely affected should be notified of the application, eg next of kin in the case of intestacy or persons who have been named as beneficiaries in a previous will. The fact that notification may cause contention or acrimony within the patient's family is not a sufficient reason of itself to dispense with notification.

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SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

695 Drafting a statutory will

NOTES--See *G v Official Solicitor* [2006] EWCA Civ 816, [2006] WTLR 1201.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iii) Specific Powers/696. Execution and effect of a statutory will.

696. Execution and effect of a statutory will.

The following provisions have effect until a day to be appointed¹. Where the judge² makes or gives an order, direction or authority requiring or authorising a person (referred to as 'the authorised person') to execute a will for a patient³, any will executed must be expressed to be signed by the patient acting by the authorised person⁴, and must be signed by the authorised person with the name of the patient, and with his own name, in the presence of two or more witnesses present at the same time⁵, and attested and subscribed by those witnesses in the presence of the authorised person⁶ and sealed with the official seal of the Court of Protection⁷.

Any such will so executed has the same effect for all purposes as if the patient were capable of making a valid will and the will had been executed by him in the manner normally required⁸. However, the provision that such a will has effect as if the patient were capable of making a valid will does not have effect in relation to such a will in so far as it disposes of any immovable property, other than immovable property in England or Wales⁹. Nor does it have such effect where at the time when such a will is executed the patient is domiciled in Scotland or Northern Ireland or in a country or territory outside the United Kingdom¹⁰ in so far as it relates to any other property or matter, except any property or matter in respect of which, under the law of his domicile, any question of his testamentary capacity would fall to be determined in accordance with the law of England and Wales¹¹.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the judge see PARA 674 ante.

3 For the meaning of 'patient' see PARA 681 ante.

4 Mental Health Act 1983 s 97(1). The Wills Act 1837 has effect in relation to any such will as if it were signed by the patient by his own hand, except that the provisions as to execution and attestation do not apply and in the subsequent provisions any reference to execution in the manner required must be construed as a reference to execution in the manner required by the Mental Health Act 1983: s 97(2). As to the principles applicable in the drafting of a statutory will see PARA 695 ante.

5 Ibid s 97(1)(a).

6 Ibid s 97(1)(b).

7 Ibid s 97(1)(c). A statutory will does not have to be sealed during a testator's lifetime: *Re Hughes* (1999) Times, 8 January. As to the Court of Protection see PARA 676 ante.

8 Mental Health Act 1983 s 97(3). The manner required is that required by the Wills Act 1837: see WILLS vol 50 (2005 Reissue) PARA 301 et seq. Provided that the formalities as to signing, attestation and sealing are complied with, the High Court has no jurisdiction to interfere with a will so made: *Re Davey* [1980] 3 All ER 342, [1981] 1 WLR 164, Ct of Protection.

9 Mental Health Act 1983 s 97(4)(a). For the meaning of 'England' see PARA 405 note 6 ante; and for the meaning of 'Wales' see PARA 405 note 7 ante.

10 For the meaning of 'United Kingdom' see PARA 406 note 18 ante.

11 Mental Health Act 1983 s 97(4)(b).

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SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iii) Specific Powers/697. Carrying on profession, trade or business.

697. Carrying on profession, trade or business.

The following provisions have effect until a day to be appointed¹. A suitable person may be authorised to carry on any profession, trade or business² (including a partnership) of the patient³. Generally evidence will be required to show that the business, if not previously carried on at a profit, can by proper management be profitably and advantageously run in the future. However, in some cases it may be advisable in the patient's interest to carry on an unprofitable concern⁴. The effect of authorising a person to carry on the patient's business is to make him the agent of the patient for the purpose of carrying on the business; accordingly, in the absence of evidence that he intended to pledge his personal credit, he is not liable on trade contracts⁵.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 In appropriate cases the business may be converted into a limited company.

3 Mental Health Act 1983 s 96(1)(f). See PARA 683 ante. For the meaning of 'patient' see PARA 681 ante.

Where a patient is the director of a private company, his directorship will usually be determined by the operation of the articles of association: Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule Table A art 81(c). If the articles do not provide for such eventualities, the Court of Protection may direct the receiver to take steps to procure the retirement of the patient as a director.

As to a patient who is a pharmacist see the Medicines Act 1968 s 72(1)(c) (prospectively amended); para 625 ante; and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 913. As to a patient who holds a justices' licence see the Licensing Act 1964 s 8(1) (as amended); and LICENSING AND GAMBLING vol 67 (2008) PARA 26. As to a patient who is licensed under the Consumer Credit Act 1974 see the Consumer Credit Act 1974 s 37(1)(c) (prospectively substituted); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 134.

4 Eg where the patient lives with his family on his farm or business premises and it would distress him and retard his recovery if the business was sold.

Where it is desirable to retain the practice of a solicitor who becomes mentally disordered, the usual way is to authorise another solicitor to enter into an agreement to carry on the practice, it being an express term of the agreement that the practice be restored to the patient on his recovery. A practising certificate may be withheld from a solicitor who is a patient or a person as to whom powers are exercisable and have been exercised under the Mental Health Act 1983 s 98 (see PARA 684 ante); see the Solicitors Act 1974 s 12(1)(j) (as amended; prospectively substituted); and PARA 624 ante.

5 *Isaacs v Chinery* (1896) 74 LT 320; *Plumpton v Burkinshaw* [1908] 2 KB 572, CA. See also *Burt, Boulton and Hayward v Bull* [1895] 1 QB 276, CA; *Owen & Co v Cronk* [1895] 1 QB 265, CA; *Re EG* [1914] 1 Ch 927 at 933, CA; *Re Wheeler* [1928] Ch 223 at 228, 233, CA.

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674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iii) Specific Powers/698. Carrying out of contracts.

698. Carrying out of contracts.

The following provisions have effect until a day to be appointed¹. Authority may be given for the carrying out of any contract entered into by the patient², and in any proceedings relating to a patient³ the Court of Protection⁴ may make or cause to be made such inquiries as it thinks fit as to any dealing with the patient's property before the commencement of the proceedings and as to the mental capacity of the patient at the time of the dealing⁵. Thus inquiry may be made into transactions under a power of attorney⁶.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 Mental Health Act 1983 s 96(1)(h). For the meaning of 'patient' see PARA 681 ante.

As to the circumstances in which the Court of Protection has concurrent jurisdiction with the High Court, where a patient is a trustee, in relation to matters consequent on the carrying out of a contract see PARA 721 post.

3 As to the meaning of 'patient' in the Court of Protection Rules 2001, SI 2001/824 (as amended) see PARA 681 note 7 ante.

4 As to the Court of Protection generally see PARA 676 ante.

5 Court of Protection Rules 2001, SI 2001/824, rr 69, 71. The rules are made under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) (see note 1 supra), and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post).

6 See the Court of Protection Rules 2001, SI 2001/824, rr 69, 71; and PARA 733 post.

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674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iii) Specific Powers/699. Repayment of debts and advances for patient's maintenance.

699. Repayment of debts and advances for patient's maintenance.

The following provisions have effect until a day to be appointed¹. Inquiries may be made as to any debts due from the patient². Money applied in payment of the patient's³ debts, whether legally enforceable or not⁴, and advances for the maintenance or other benefit of the patient or members of his family or other persons or purposes for whom, or which, he might have been expected to provide if he were not mentally disordered, may be directed to be reimbursed out of the patient's property with or without interest⁵. Such advances may have been made voluntarily as a gift and without any expectation of being repaid, or by way of loan. In the case of advances made as a gift, repayment will be refused; but in the case of advances made by loan, an obligation will be implied on the part of the patient to repay such advances⁶, and reimbursement may be directed whether the obligation is legally enforceable or not⁷. After the death of a patient, payment for past maintenance can only be claimed from his representatives as a debt⁸.

The amount due to any public authority for the past maintenance of a patient⁹ may, unless the Court of Protection¹⁰ otherwise directs, be proved by the filing of an account certified under the hand of the proper officer of the authority¹¹.

Where a patient's liquid resources do not permit of the payment of debts or past or future maintenance or other obligations, a charge may be created on the property of the patient or on specific assets¹². A charge in respect of maintenance will normally be granted with simple interest at the current judgment rate¹³. The charging order states that the charge is not to be enforceable (except with the leave of the court) until the death or recovery of the patient and is subject to any order for the application for the benefit of the patient of the property charged, but before any such order is made notice is to be given to the chargees¹⁴.

Where a charging order¹⁵ has been obtained on a fund paid into court in proceedings under Part VII of the Mental Health Act 1983 or a writ of fieri facias issued¹⁶, creditors are unable to enforce either remedy as against the judge's power in such proceedings to dispose of such a fund for the patient's benefit during his life¹⁷.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post).

2 As to the general power to make inquiries see the Court of Protection Rules 200, SI 2001/824, rr 67-71; and PARA 733 post.

3 For the meaning of 'patient' see PARA 681 ante.

4 Debts which are not legally recoverable include for this purpose debts barred by lapse of time. See generally LIMITATION PERIODS.

5 Mental Health Act 1983 s 96(1)(j). See PARA 683 ante. As to the power of certain authorities to apply a patient's pay or pension for reimbursement see PARA 628 ante. As to the general power of the judge to provide for the maintenance of the patient, his family and other persons for whom he might have been expected to

provide see PARA 682 ante. As to allowances to relations see PARA 685 ante. As to the rights of creditors see PARA 686 ante.

6 *Re Weaver* (1882) 21 ChD 615, CA (claim for part maintenance allowed); *Re Rhodes, Rhodes v Rhodes* (1890) 44 ChD 94, CA (claim in administration of estate of mentally disordered person; claim disallowed as payments of maintenance were not made with the intention that they should be repaid). As to the statutory and quasi-contractual obligations of a mentally incapacitated person to pay for necessities see PARA 604 ante.

7 As to the duty of the judge to have regard to the desirability of providing for obligations of the patient even though they may not be legally enforceable see the Mental Health Act 1983 s 95(2); and PARAS 682, 686 ante. See also note 4 supra. In *Re Weaver* (1882) 21 ChD 615, CA, six years only of past maintenance were directed to be repaid by reason of the provision now re-enacted in the Limitation Act 1980 s 5 (see LIMITATION PERIODS vol 68 (2008) PARAS 915, 919, 956), which imposes a six year period of limitation for action in contract; and see *Re Newbegin's Estate, Eggleton v Newbegin* (1887) 36 ChD 477 at 484. However, it is submitted that *Re Weaver* supra would not now be followed on this point.

8 *Re Marman's Trusts* (1878) 8 ChD 256, CA.

9 As to the meaning of 'patient' in the Court of Protection Rules 2001, SI 2001/824 (as amended) see PARA 681 note 7 ante.

10 As to the Court of Protection see PARA 676 ante.

11 Court of Protection Rules 2001, SI 2001/824, r 36.

12 As to the power of the judge (as distinct from the High Court) to charge a patient's property see PARA 691 ante.

13 *Re LMR* (15 January 1970, unreported), Ct of Protection, per Sir Raymond Jennings QC, Master.

14 *Re Chapman* (1905) unreported; *Re TRM (a person of unsound mind)* [1939] Ch 260, [1938] 4 All ER 194.

15 *Re Plenderleith* [1893] 3 Ch 332, CA. See also PARA 640 ante; and SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 920.

16 *Re Winkle* [1894] 2 Ch 519, CA. As to writs of fieri facias see CIVIL PROCEDURE vol 12 (2009) PARA 1266.

17 A creditor who has obtained a charging order on the patient's funds in the High Court, which have not yet been brought under the control of the Court of Protection, even though the order was obtained after the incapacity, will not be deprived of his rights: *Re Brown, Llewellyn v Brown* [1900] 1 Ch 489.

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SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iii) Specific Powers/700. Adjudication in bankruptcy.

700. Adjudication in bankruptcy.

Incapacity is no bar to being made bankrupt and specific provision is made by the Insolvency Rules 1986 for persons who are incapable of managing their property and affairs¹. A patient may be adjudicated bankrupt under the direction of the Court of Protection² but it also seems clear that he may be so adjudicated without its concurrence³.

The court's discretionary powers of applying the patient's property for his benefit cannot be ousted by an adjudication in bankruptcy as long as the jurisdiction of the court continues⁴. However, a receiver may be appointed in bankruptcy proceedings notwithstanding the appointment of a receiver by the Court of Protection⁵.

Whether a patient for whom no receiver has been appointed is capable of committing an act of bankruptcy which involves intent on his part, during a lucid interval, is questionable⁶.

The title of the trustee in bankruptcy to any asset of the bankrupt vested in the trustee prior to the bankrupt's incapacity is not affected by the subsequent appointment of a receiver⁷.

¹ See the Insolvency Rules 1986, SI 1986/1925 (as amended): and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 10, 815.

² See *Re Farnham* [1895] 2 Ch 799 at 807, CA; *Re Debtor (No 1 of 1941)* [1941] Ch 487 at 491, [1941] 3 All ER 11 at 14, DC. As to the Court of Protection see PARA 676 ante.

³ *Re Debtor (No 1 of 1941)* [1941] Ch 487 at 493, [1941] 3 All ER 11 at 15, DC.

⁴ *Re Debtor (No 1 of 1941)* [1941] Ch 487 at 499, [1941] 3 All ER 11 at 18, DC.

⁵ *Re Belton* (1913) 108 LT 344 (where only the patient's income, but not the corpus of his property, was vested in the receiver).

⁶ See *Re Debtor (No 1 of 1941)* [1941] Ch 487 at 493-494, [1941] 3 All ER 11 at 15, DC; *Crowther v Crowther* [1951] AC 723, [1951] 1 All ER 1131, HL (a case of intention to desert); *Morriss v Marsden* [1952] 1 All ER 925 at 926 per Stable J (a case in tort, where *Re Debtor (No 1 of 1941)* supra was not cited); *Crispe v Peritt* (1744) Willes 467 at 473; *Re Spence, ex p Stamp* (1846) De G 345; *Re RSA* [1901] 2 KB 32, CA.

⁷ *Re Hinds* (1877) 7 ChD 26, CA.

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674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

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701. Exercise of powers vested in patient.

The following provisions have effect until a day to be appointed¹. The judge² may authorise the exercise of any power (including a power to consent) vested in a patient³, whether beneficially or as guardian or trustee, or otherwise⁴.

Examples of beneficial powers which may be thus exercised are power to elect⁵, power to accept a devise containing an onerous condition⁶, power to consent to the exercise of a power of advancement under a settlement⁷, power to revoke a voluntary settlement⁸, power to bar the estate tail of a tenant in tail⁹, powers exercisable by a mortgagee¹⁰, and power to exercise a testamentary power of appointment¹¹.

Examples of powers vested in a patient in a fiduciary capacity, although he is not in fact a trustee¹², include a joint power of appointment in a marriage settlement in favour of children¹³, consenting to the exercise by a personal representative of his power of appropriation¹⁴, and powers exercisable by a tenant for life¹⁵.

A receiver or other person may be authorised to exercise on behalf of a patient who is a tenant for life of land the powers of sale, exchange or leasing conferred by the Settled Land Act 1925¹⁶ on tenants for life¹⁷. The receiver must obtain leave of the Court of Protection before giving the statutory notice¹⁸ to the trustees of the settlement of his intention to sell, exchange or lease¹⁹, and where there are no trustees, new trustees of the settlement must first be appointed²⁰.

The jurisdiction to exercise a power vested in a patient as guardian has been held to enable the judge, through the receiver, to exercise powers of the patient as guardian of his minor children²¹.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the judge see PARA 674 ante.

3 For the meaning of 'patient' see PARA 681 ante.

4 Mental Health Act 1983 s 96(1)(k): see PARA 683 ante. See also *Re RHC* [1963] 1 All ER 524, [1963] 1 WLR 1095, Ct of Protection. As to conveyances and the exercise of the powers of a proprietor of registered land on behalf of persons suffering from mental disorder see PARA 687 ante. As to the exercise of the powers of a patient as patron of a benefice see PARA 702 post.

5 *Wilder v Pigott* (1882) 22 ChD 263.

6 *Re Earl of Sefton* [1898] 2 Ch 378, CA. In deciding whether or not it is for the patient's benefit to comply with a condition the judge will act for the patient as though he were of sound mind and guided by reasonable motives: *Re Earl of Sefton* supra.

7 *Re Nevill* (1885) 31 ChD 161.

8 *Re Price* (1909) unreported, CA.

9 *Re Pares, Lillingston v Pares* (1879) 12 ChD 333; and see *Re Sparrow* (1882) 20 ChD 320, CA; *Re EDS* [1914] 1 Ch 618, CA. These cases establish that the rights of remaindermen will not be interfered with more than is necessary to effect the particular purpose. See also *Re RHC* [1963] 1 All ER 524, [1963] 1 WLR 1095, Ct of Protection.

- 10 When a mortgagee's power of sale is exercised, it is the practice to authorise the receiver not only to sell but also to convey.
- 11 Mental Health Act 1983 s 96(1)(e).
- 12 See *Re A* [1904] 2 Ch 328 at 333.
- 13 *Re A* [1904] 2 Ch 328.
- 14 See the Administration of Estates Act 1925 s 41(1) proviso (ii) (as amended; prospectively amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 573-575.
- 15 *Re X* [1894] 2 Ch 415; and see PARA 701 post.
- 16 See the Settled Land Act 1925 ss 38-48 (as amended); and SETTLEMENTS vol 42 (Reissue) PARA 827 et seq.
- 17 See the Mental Health Act 1983 s 96(1)(k); and PARA 683 ante. Under s 96(1)(k), the authority is given to the receiver if one has been appointed: see s 99(1); and PARA 707 post. As to conveyances etc on behalf of persons suffering from mental disorder see PARA 687 ante.
- 18 Ie under the Settled Land Act 1925 s 101(1): see SETTLEMENTS vol 42 (Reissue) PARA 783.
- 19 *Re Ray's Settled Estates* (1884) 25 ChD 464.
- 20 *Re Taylor* (1883) 52 LJCh 728, CA. As to the necessity for appointing a new trustee in place of a person incapable by reason of mental incapacity before a legal estate is dealt with under a trust see PARA 626 ante.
- 21 *Re LHB* [1935] Ch 643, CA. However, parental guardianship is abolished by the Children Act 1989 ss 2(4), 108(7), Sch 15: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 144. The court may nevertheless regard the powers of a parent having parental responsibility by virtue of the Children Act 1989 as falling within the words 'or otherwise' in the Mental Health Act 1983 s 96(1)(k). Further, the court may become involved in adoption proceedings concerning the child of a patient by virtue of s 96(1)(i) (see PARA 683 ante). However, it is the normal practice of the Court of Protection not to interfere or attempt to exercise jurisdiction in regard to adoption proceedings, on the ground that it is for the appropriate court to satisfy itself by medical evidence or otherwise as to whether or not the patient's agreement to the adoption should be dispensed with on the ground of his incapacity.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iii) Specific Powers/702. Patronage of benefices.

702. Patronage of benefices.

The following provisions have effect until a day to be appointed¹. If the owner of an advowson² is incapacitated by mental disorder from making a presentation to a living, the powers of the patient³ as patron of the benefice are exercised by the Crown⁴. The wishes of the patient's family are consulted, and all the functions of the mentally disordered patron (for example, giving any necessary consents) are performed on his behalf⁵.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to advowsons see ECCLESIASTICAL LAW vol 14 para 776.

3 For the meaning of 'patient' see PARA 681 ante.

4 Mental Health Act 1983 s 96(5). See PARA 683 ante; and ECCLESIASTICAL LAW vol 14 paras 781, 784, 787. Historically, these functions have carried out by the Lord Chancellor, but ecclesiastical patronage will in future be exercised on the advice of the Prime Minister.

5 See ECCLESIASTICAL LAW vol 14 paras 781, 784, 787.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iii) Specific Powers/703. Power to conduct litigation.

703. Power to conduct litigation.

The following provisions have effect until a day to be appointed¹. The judge² may make an order or give directions for the conduct of legal proceedings in the name of the patient³ or on his behalf⁴. The procedure governing claims by or against a patient, or other persons under disability, is governed by the relevant rules and practices⁵. If a receiver has been appointed he will act at his own risk in bringing or defending a claim in the name of the patient or on his behalf if he does not have the authority of the Court of Protection⁶.

The court may consider an application to institute divorce or other family proceedings⁷ on behalf of a patient⁸. A report from one of the Lord Chancellor's medical visitors will usually be obtained⁹. Full information as to the financial consequences which might follow if a divorce were granted will be required before authority is given¹⁰.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the judge see PARA 674 ante.

3 For the meaning of 'patient' see PARA 681 ante.

4 Mental Health Act 1983 s 96(1)(i); and see PARA 683 ante. Where the means of a patient are such that he is eligible for assistance, reference should be made to the legal aid system under the Access to Justice Act 1999 Pt 1 (ss 1-26) (as amended); see LEGAL AID vol 65 (2008) PARA 1 et seq.

5 See CPR Pt 21; and PARA 634 et seq ante. See also generally CIVIL PROCEDURE.

6 *Re Notley* (1839) 3 Jur 719; *Baker v Baker* (1880) 5 PD 142 (affd 6 PD 12).

7 As to the effect of mental disorder upon marriage and divorce generally see PARAS 614-615 ante.

8 Divorce proceedings may be for the 'benefit' of the patient (see PARA 682 ante), giving benefit a wide construction so as to include not merely what is materially or financially beneficial; the court should act as a properly advised decent sane person in the patient's position would act (applying *Re TB* [1967] Ch 247 at 253, [1966] 3 All ER 509 at 513, Ct of Protection); and the patient's 'requirements' should be given a similarly wide construction: *Re W(EEM)* [1971] Ch 123, [1970] 2 All ER 502, Ct of Protection (authority to petition for divorce on behalf of patient, subject to the master being satisfied that proper financial provision was made, and approved by the divorce court, designed to ensure that no financial loss would fall upon the patient as a result of the proceedings). See also *Countess of Portsmouth v Earl of Portsmouth* (1828) 1 Hag Ecc 355 (nullity of marriage); *Woodgate v Taylor* (1861) 2 Sw & Tr 512 (presumption of death and dissolution of marriage or judicial separation).

Where a person is authorised under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) to conduct legal proceedings in the name of the patient or on his behalf, that person is entitled to be litigation friend (formerly 'next friend' or guardian ad litem) of the patient in any family proceedings to which his authority extends: Family Proceedings Rules 1991, SI 1991/1247, r 9.2(3) (as amended). If the receiver has an adverse interest in the proceedings, however, the master may prefer that the Official Solicitor conduct the proceedings and be litigation friend (formerly 'next friend') or guardian. As to the Official Solicitor see PARA 748 post.

9 As to the Lord Chancellor's Visitors see PARA 747 post. In this connection, the visitor will be asked to report on whether there is a real chance of the patient's recovering and if so within what time, and whether the patient is able to appreciate what the proceedings involve and if so whether the patient appears to desire a divorce.

10 See *Re W(EEM)* [1971] Ch 123, [1970] 2 All ER 502, Ct of Protection.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

703 Power to conduct litigation

NOTE 8--Now, where a person has authority as a deputy (within the meaning of the Mental Capacity Act 2005 s 16(2)(b)) to conduct legal proceedings in the name of a protected party or on his behalf, that person is entitled to be next friend or guardian ad litem of the protected party in any family proceedings to which his power extends: SI 1991/1247 r 9.2(3) (amended by SI 2007/2187).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iv) Receivers and Authorised Persons/704. Power to appoint receivers.

(iv) Receivers and Authorised Persons

704. Power to appoint receivers.

The following provisions have effect until a day to be appointed¹. The judge² may by order appoint a specified person³, or the holder for the time being of a specified office⁴, as receiver⁵. The receiver must do all such things in relation to the property⁶ and affairs of the patient⁷ as the judge in the exercise of his statutory powers⁸ orders or directs, and may do such things as he is authorised by the judge in the exercise of those powers to do⁹. If the Court of Protection¹⁰ is of the opinion that it is necessary to make immediate provision in relation to the property and affairs of a patient¹¹ for any of the matters referred to in the provision specifying the general functions of the judge¹², it may by order¹³ appoint an interim receiver¹⁴.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally, and for transitional provisions relating to receivers, see PARA 406 ante.

2 As to the judge see PARA 674 ante.

3 Where in the court's opinion two or more receivers ought to be appointed for the same patient and one or more of them ought to continue after the death or discharge of any of the others, the court, when appointing them receivers, may direct that the receivership is to continue in favour of the surviving or continuing receiver or receivers: Court of Protection Rules 2001, SI 2001/824, r 44 (amended by SI 2001/2977). Such appointments are not usual as they are not conducive to the smooth running of the estate and involve more expenses and delay. The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) (see note 1 supra), and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post).

4 As to the choice of a person as receiver see PARA 706 post.

5 Mental Health Act 1983 s 99(1). As to the objects of appointment of a receiver see *Bell v Todd* [2002] Lloyd's Rep 12, [2001] All ER (D) 348 (Jun). See also *Cassell v Riverside Health Authority* [1994] PIQR Q168, CA. As to the power to authorise a person to deal with the patient's property in lieu of appointing a receiver see PARA 727 post. As to orders transferring stock into the name of a receiver or a new receiver see PARA 724 post.

6 As to the meaning of 'property' see PARA 681 note 5 ante.

7 For the meaning of 'patient' see PARA 681 ante.

8 Ie the powers conferred by the Mental Health Act 1983 ss 95, 96: see PARA 681 et seq ante. As to the duty of a receiver to execute conveyances on behalf of the patient see PARA 687 ante.

9 Ibid s 99(2). As to the protection of acts done under the Mental Health Act 1983 see PARA 407 ante.

10 As to the Court of Protection generally see PARA 676 ante.

11 As to the meaning of 'patient' in the Court of Protection Rules 2001/824 (as amended) see PARA 681 note 7 ante.

12 Ie the matters referred to in the Mental Health Act 1983 s 95: see PARA 683 ante.

13 For a first application for appointment of a receiver see the Court of Protection Rules 2001, SI 2001/824, r 7(1), Schedule Form A. An application to the court respecting the exercise of any of its other jurisdiction in

relation to a patient may be made by letter unless the court directs that a formal application (see Schedule Form A) must be made: r 7(1). As to formal applications see PARA 726 post.

14 Ibid rr 42, 54. The appointment continues until further order, subject to any direction given by the court: r 42(1)(b). The court may by certificate or direction direct or authorise any named person to do any act or carry out any transaction specified in the certificate or direction: r 42(1)(a). Unless the court otherwise directs, an order appointing an interim receiver must be served on the patient within such time as the order may specify, and the patient may, within such further time as the order may specify, apply under r 54 (see PARA 742 post) for review of the order by the court or, if the order was made by the judge, apply to have it set aside: r 42(2). As to the judge for this purpose see PARA 674 ante.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iv) Receivers and Authorised Persons/705. Inquiries as to the desirability of appointing receiver etc.

705. Inquiries as to the desirability of appointing receiver etc.

The following provisions have effect until a day to be appointed¹. Where the Court of Protection² has reason to believe that a receiver should be appointed for a patient³ or that any other power conferred on the court should be exercised with respect to a patient's property and affairs, the court may direct an officer of the court or the Official Solicitor⁴ to make inquiries and report to the court whether it is desirable in the patient's interests that an application should be made for the purpose⁵, or may direct a medical visitor⁶ to visit the patient and report to the court on the patient's capacity to manage and administer his property and affairs⁷.

On receiving a report the court may, if it thinks fit, exercise its power to direct an application to be made⁸ by an officer of the court or the Official Solicitor⁹, or, if the report is by a medical visitor and the court is satisfied that the patient is incapable, by reason of mental disorder, of managing and administering his property and affairs, make an order¹⁰ appointing a receiver or exercising any other power conferred on it with respect to the patient's property and affairs¹¹.

1 The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). The Mental Health Act 1983 Pt VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the Court of Protection see PARA 676 ante.

3 As to the meaning of 'patient' in the Court of Protection Rules 2001, SI 2001/824 (as amended) see PARA 681 note 7 ante.

4 As to the Official Solicitor see PARA 748 post; and COURTS vol 10 (Reissue) PARA 667.

5 Court of Protection Rules 2001, SI 2001/824, rr 11, 67(1)(a).

6 As to medical visitors see PARA 747 post.

7 Court of Protection Rules 2001, SI 2001/824, r 67(1). As to the general duty of the Lord Chancellor's Visitors to visit patients for the purpose of investigating their capacity and the power of the master of the Court of Protection to do so see PARA 747 post. As to the power to make an order for a patient's attendance for examination see PARA 732 post.

8 Ie pursuant to ibid rr 11, 67(2): see PARA 728 post.

9 Ibid r 11. As to the representation of patients by the Official Solicitor see PARA 734 note 3 post. As to the power to direct the Official Solicitor to conduct proceedings when he is directed to take out a witness summons see PARA 732 post. As to the costs of the Official Solicitor see PARA 740 note 7 post.

10 Ibid rr 6, 7. See PARA 704 ante.

11 Court of Protection Rules 2001, SI 2001/824, rr 11, 67(2).

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iv) Receivers and Authorised Persons/706. Choice of person to be appointed receiver.

706. Choice of person to be appointed receiver.

The following provisions have effect until a day to be appointed¹. Where there is no suitable person able and willing to act, an independent person may be appointed, for example a friend of the patient, or an officer of a local authority², or the holder of a specified office³. In appointing a receiver, the court will usually prefer relatives to strangers⁴, but a husband or wife, if any, has no paramount claim⁵, and preference will be given to a receiver who can frequently visit the patient and supervise his affairs⁶. In appropriate cases⁷, the court may be prepared to appoint a solicitor⁸. It is not the normal practice to appoint an accounting party⁹. The proposed receiver should reside within the jurisdiction¹⁰, although this is not always insisted on¹¹. Regard will be had, as far as possible, to any expressions or wishes of the patient on the subject¹², but a receiver may not be appointed to investigate his own dealings¹³. Joint receivers may be appointed, but such appointments are not favoured¹⁴.

If difficulty is experienced in obtaining a suitable receiver or for other reasons it is desirable that there be an absolutely independent receiver, the court may appoint an officer of the court as receiver¹⁵.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 *Re TRM (a person of unsound mind)* [1939] Ch 260, [1938] 4 All ER 194. Where an officer of a council which is the local authority for the purposes of the Local Authority Social Services Act 1970 (see LOCAL GOVERNMENT vol 69 (2009) PARA 23) applies for appointment as a receiver or as a person otherwise having functions in relation to a patient's property and affairs, the council may defray the expenses of his application and of the exercise of his functions so far as not recoverable by him from any other source: National Assistance Act 1948 ss 48(4), 49 (amended by the Mental Health Act 1959 s 149(1), Sch 7 Pt I; the Local Government Act 1972 s 195(6), Sch 23 para 2(10), (11); and the Local Government (Scotland) Act 1973 s 214, Sch 27 Pt II para 93). As from a day to be appointed, the National Assistance Act 1948 s 49 (as amended) is further amended so as to refer to applying for appointment by the Court of Protection as deputy: see s 49 (prospectively amended by the Mental Capacity Act 2005 s 67(1), Sch 6 para 6). At the date at which this volume states the law no such day had been appointed. As to the functions of local authorities under the Mental Health Act 1983 see PARA 424 et seq ante.

3 *Ibid* s 99(1). If an officer of a local authority is appointed as a receiver for a patient in pursuance of s 99, the authority may pay to the officer any sum which he becomes liable to pay in consequence of the appointment and may pay the premiums in respect of any insurance policy for indemnifying the officer from the consequences of any act or omission connected with the appointment which occurs while he holds the appointment: Local Government (Miscellaneous Provisions) Act 1976 s 31. As from a day to be appointed, s 31 is amended so as to refer to being appointed a deputy for a person by the Court of Protection: see s 31 (prospectively amended by the Mental Capacity Act 2005 Sch 6 para 23). At the date at which this volume states the law no such day had been appointed.

4 *Re Le Heup* (1811) 18 Ves 221.

5 *Re Davy* [1892] 3 Ch 38.

6 *Re Errington, ex p Fermor* (1821) Jac 404.

7 *Ie* particularly where the patient clearly desired his own solicitor to be receiver. Cf *Ex p Pincke* (1817) 2 Mer 452.

8 Compare *Ex p Pincke* (1817) 2 Mer 452; *Re Millington* (1854) 2 Eq Rep 158; and the Court of Protection Rules 2001, SI 2001/824, r 87. This change in practice has arisen from the need to appoint the Public Trustee only when absolutely necessary. The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) (see note 1 supra), and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). As to the Public Trustee see PARA 748 post.

9 *Re Millington* (1854) 2 Eq Rep 158.

10 *Re Shields, ex p Ord* (1821) Jac 94. Inconveniences usually result from the appointment of a receiver out of the jurisdiction, especially if the estate is land in England: *Re L* (1902) unreported, per Cozens-Hardy LJ.

11 *Re Bruère* (1881) 17 ChD 775; *Re Hopper* (1897) 66 LJCh 569.

12 *Re Leacocke* (1838) L & G temp Plunk 498; *Howden v Sibbald* (1833) 11 Shaw 561.

13 *Re Dimmock* (1934) unreported, per Slessor LJ.

14 As to the choice of receivers generally see RECEIVERS vol 39(2) (Reissue) PARA 330 et seq.

15 As to the provision of fees payable when an officer of the court is appointed as receiver see the Court of Protection Rules 2001, SI 2001/824, r 80A (as added); and PARA 739 post.

UPDATE

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SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

706 Choice of person to be appointed receiver

NOTES 1-3--Day now appointed: SI 2007/1897.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iv) Receivers and Authorised Persons/707. Effect of appointment of receiver.

707. Effect of appointment of receiver.

The appointment of a receiver does not preclude the courts from enforcing the statutory or common law rights of persons having lawful claims¹. Thus, in a proper case, a bankruptcy order against the patient may be made², and in a matrimonial cause ancillary relief may be ordered for either party to a marriage notwithstanding the fact that the other party to the marriage is mentally incapacitated³; but orders obtained by creditors and other persons having lawful claims against mentally disordered persons are subject to the overriding principle that the patient's interest is the primary consideration for the judge in the exercise of his jurisdiction⁴.

There is no direct control over the person of a patient in respect of whom a receiver has been appointed, but only an indirect one by virtue of the receiver's control of his financial affairs⁵.

1 *CL v CFW* [1928] P 223 at 225.

2 *Re Belton* (1913) 108 LT 344. As to bankruptcy proceedings in relation to mentally disordered persons see PARA 700 ante.

3 *CL v CFW* [1928] P 223; *Swettenham v Swettenham* [1939] 3 All ER 989, CA. See PARA 615 ante; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 455.

4 As to the rule that the patient's interest is the primary consideration see PARA 682 ante. As to the position of creditors generally see PARA 686 ante.

5 See PARA 681 note 6 ante.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iv) Receivers and Authorised Persons/708. Position and remuneration of receiver.

708. Position and remuneration of receiver.

A receiver is the statutory agent of the patient¹. In all important matters outside the scope of his order, he should act under the directions of the Court of Protection². If he neglects to obtain such directions, he may be liable for the wrong exercise of his discretion³. He is responsible only to the court, and, in the absence of misconduct by him, the interference of third persons with his management of the estate will not be tolerated⁴.

Until a day to be appointed⁵, a receiver may be allowed remuneration for his services at such amount or at such a rate as the Court of Protection considers reasonable and proper⁶, but no request by a receiver to have the sum payable for his remuneration fixed after the patient's death or recovery may be entertained unless, during the receivership, the court has directed that remuneration be allowed, and the request is made within six years from the date of the receiver's discharge⁷. In no circumstances will he be allowed, apart from remuneration, to make a profit out of the estate⁸.

1 *Re EG* [1914] 1 Ch 927 at 933, CA; *Re Wheeler* [1928] Ch 223 at 228, 231, 233, CA.

2 As to the Court of Protection see PARA 676 ante.

3 The letting of property on his own responsibility at an inadequate rent may render the receiver liable to make good the deficiency and all costs (*Re Wilkins, ex p Wilkins, ex p Jenvey* (1842) 6 Jur 308), as also will his failure to take steps to recover money due or to obtain directions thereon (*Re Swindell, ex p Swindell, ex p Ordish* (1852) 2 De G M & G 91). He must not use his own judgment on a question of title: *Wright v Chard* (1860) 6 Jur NS 476. If he sues or defends without leave, he will act at his own risk as to costs: *Re Notley* (1839) 3 Jur 719; and see also *Re RSA* [1901] 2 KB 32, CA. As to the court's powers to authorise the conducting of proceedings see PARA 683 ante. See also RECEIVERS vol 39(2) (Reissue) PARA 313 et seq.

4 *Re Hitchon* (1846) 15 LJCh 126. As to the effect of an order authorising a receiver to carry on a patient's profession, trade or business see PARA 697 ante.

5 The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). The Mental Health Act 1983 Pt VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

6 See the Court of Protection Rules 2001, SI 2001/824, r 43 (amended by SI 2002/833). There is similar provision in the rule for any 'named person', that is any person whom the court orders, directs or authorises to deal with a patient's property (or any of it) or affairs, including (but not limited to) by way of an order under the Court of Protection Rules 2001, SI 2001/824, r 8 (as amended) (see PARA 727 post). Any remuneration allowed constitutes a debt due to the receiver (or named person) from the patient and his estate: r 43(1) (substituted by SI 2002/833). As to the disallowance of remuneration when a receiver is in default as to his accounts see the Court of Protection Rules 2001, SI 2001/824, r 63; and PARA 713 post. The usual case for allowing remuneration is where a professional person, eg a chartered accountant or estate agent, is appointed receiver or where there are a large number of rents to be collected and a number of houses to be managed: see *Re Errington, ex p Fermor* (1821) Jac 404; *Re Walker* (1848) 2 Ph 630; *Re Westbrooke* (1848) 2 Ph 631.

7 Court of Protection Rules 2001, SI 2001/824, r 43(2) (amended by SI 2002/833). This also applies to a named person: see note 6 supra.

8 *Lady Cope's Case* (1677) 2 Cas in Ch 239.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iv) Receivers and Authorised Persons/709. Employment of agent by receiver.

709. Employment of agent by receiver.

In cases involving much time and labour in collecting rents and managing a large estate, the receiver may be authorised to employ an agent at a proper salary. The agent will usually be required to give security, to account for his receipts and to deal with them as may be directed¹.

¹ See *Re Errington* (1826) 2 Russ 567. Failure to pass accounts when due will render the agent liable to payment of interest on his balances: see -- *v Jolland* (1802) 8 Ves 72.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iv) Receivers and Authorised Persons/710. Security.

710. Security.

The following provisions have effect until a day to be appointed¹. Where a person other than the Official Solicitor² or an officer of the court is appointed receiver he must, unless the Court of Protection³ otherwise directs, give such security for the due performance of his duties as the court may approve, and must give it before acting as receiver, unless the court allows it to be given subsequently⁴: the order must not be entered⁵ until the person appointed has given, to the court's satisfaction, any security required to be given by him before acting⁶. The court may, from time to time, vary any security required⁷. The security is discharged on the passing of the receiver's final accounts⁸. Subject to any directions of the court, security may be given in any of the following ways or partly in one of these ways and partly in another: (1) by a bond approved by the court and given by the person giving security and also either by an insurance company, a group of underwriters or a bank approved by the court or, with the court's approval, by two personal sureties⁹; or (2) in such other manner as the court may approve¹⁰. The security usually consists of a bond with a guarantee society, or occasionally with two personal sureties, in a penal sum equal with a reasonable margin to the value of the patient's income passing through the receiver's hands annually.

A private surety is always required to justify before appointment. He is liable not only for the balance due on the receiver's accounts, but also for the costs of all proceedings subsequently taken for the purpose of enforcing payment of the balance, and this rule applies even though he had no notice of the default of his principal until after proceedings were taken¹¹. He is also liable for the costs of the removal of his principal and the appointment in the latter's place of a new receiver¹².

If a surety has died or has compounded with his creditors or otherwise become insolvent, a new bond must be entered into; and the executors of a deceased surety may obtain an order that, in default of fresh security being given, another receiver be appointed¹³.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante. The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post).

2 As to the Official Solicitor see PARA 748 post; and see COURTS vol 10 (Reissue) PARA 667.

3 As to the Court of Protection generally see PARA 676 ante.

4 Eg on the appointment of an interim receiver: see PARA 704 note 14 ante.

5 As to the entry of orders see PARA 735 post.

6 Mental Health Act 1983 s 107; Court of Protection Rules 2001, SI 2001/824, r 56(1).

7 Ibid r 56(2). Where a receiver is authorised or directed to give new security and the new security has been completed and he has paid or secured to the court's satisfaction any balance due from him, the former security must be discharged, unless the court otherwise directs: r 59.

8 See ibid r 65(as amended); and PARA 713 post.

9 Ibid r 57(a).

10 Ibid r 57(b). Every person who has given security by bond must, whenever his accounts are passed or the court so directs, satisfy the court that any premiums payable in respect of the bond have been duly paid, or, if the bond was given with personal sureties, that each surety is living and within the jurisdiction and has neither been adjudicated bankrupt nor compounded with his creditors, and, if the court is not satisfied, it may direct new security to be given or may give such other directions as it thinks fit: r 60.

11 *Re Lockett* (1845) 1 Ph 509; *Greville v Gunn* (1854) 4 ICLR 204. As to the liability of sureties for money received by the receiver after the patient's death see PARA 713 post.

12 *Re Graham, Graham v Noakes* [1895] 1 Ch 66.

13 *Re Bull* (1843) 2 Coop temp Cott 63.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iv) Receivers and Authorised Persons/711. Lodgment of deeds, money, wills, etc in court.

711. Lodgment of deeds, money, wills, etc in court.

The following provisions have effect until a day to be appointed¹. In order to reduce the amount of security to be given by a receiver, or for the purposes of safe custody, the court may receive any deed or security or direct it to be deposited with a bank, and may direct payment or transfer into court of any money or stock belonging to the patient². Documents deposited in court will, during the patient's lifetime, only be handed out to the receiver on evidence proving that they are required for the purpose of properly managing the patient's estate³, and documents deposited with a bank for safe custody will only be handed out on a direction under the seal of the court⁴.

The court will order production of deposited documents to any person who makes out a prima facie case that he is interested in them or the property to which they relate⁵, but an order cannot be made on the receiver in a claim to produce such documents, since they are not under his control⁶.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 See the Mental Health Act 1983 s 96(1)(a) (prospectively amended); and PARA 683 ante. See also *Re Eagle* (1847) 2 Ph 201. See further RECEIVERS vol 39(2) (Reissue) PARA 366. The Accountant General of the Supreme Court holds and deals with funds in court in accordance with orders of the court subject to the provisions of the Administration of Justice Act 1982 and the Court Funds Rules 1987, SI 1987/821 (as amended) (see CIVIL PROCEDURE vol 12 (2009) PARA 1548 et seq). The directions of the Court of Protection for the lodgment of and subsequent dealings with funds in court are contained in the Schedules drawn up in accordance with the provisions of the Court Funds Rules 1987, SI 1987/821 (as amended).

3 *Re Cooper* (1836) 1 My & Cr 32.

4 As to the disposal of property on the patient's death or recovery see PARA 716 post.

5 *Re Smyth* (1880) 15 ChD 286, CA; *Re Smyth* (1881) 16 ChD 673, CA; *Re Strachan* [1895] 1 Ch 439 at 444, CA. As to the inspection of records of proceedings see PARA 678 ante.

6 *Vivian v Little* (1883) 11 QBD 370.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iv) Receivers and Authorised Persons/712. Statement of property retained or deposited out of court.

712. Statement of property retained or deposited out of court.

The following provisions have effect until a day to be appointed¹. Where under a direction of the Court of Protection² any furniture or effects of a patient³ are allowed to remain in the possession of, or deposited with, any person, that person must, unless the court otherwise directs, sign and file a statement of the furniture or effects and an undertaking not to part with them except on a direction under seal⁴.

1 The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). The Mental Health Act 1983 Pt VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the Court of Protection generally see PARA 676 ante.

3 As to the meaning of 'patient' in the Court of Protection Rules 2001, SI 2001/824 (as amended) see PARA 681 note 7 ante.

4 Ibid r 72. 'Seal' means the official seal of the Court of Protection: r 2(1).

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iv) Receivers and Authorised Persons/713. Accounts.

713. Accounts.

The following provisions have effect until a day to be appointed¹. Every receiver must annually, on the death or recovery of the patient² for whom he has been appointed receiver and at any other time that the Court of Protection³ may direct, deliver his accounts to the court within such time and in such manner as the court may direct⁴. The receiver must answer such requisitions on his accounts as the court raises and in such manner and in such time as the court directs⁵. On the passing of the accounts the court must make all proper allowances out of the patient's estate, including the reasonable and proper costs of the receiver in passing the accounts⁶. The court may direct that a receiver need not account or may dispense with the passing of any accounts at any time at which they would otherwise require to be passed⁷. The balance found due from a receiver on the passing of his accounts, or so much of it as the court may direct, must be paid by the receiver into court to the credit of the proceedings and invested in such manner as the court may direct⁸, or be invested and otherwise dealt with by the receiver in such manner as the court may direct⁹.

Where a receiver fails to comply with any of these requirements as to accounting or fails to pay into court or invest or otherwise deal with any money in accordance with any direction of the court, the court may disallow any remuneration which would otherwise be due to the receiver, and, if he made default in paying into court or investing or otherwise dealing with any money, may charge him with interest at such rate as the court may fix, for the period of his default¹⁰.

Unless otherwise directed, any money ordered to be paid by a receiver for maintenance must be paid out of income, and any costs ordered to be paid by him may, when agreed, assessed by way of way of detailed assessment or fixed, be paid out of the moneys coming into his hands, after providing for any maintenance and fees payable¹¹.

On the receiver's discharge¹² or death, the receiver, or in the case of his death his personal representatives, must deliver a final account to the court within such time as the court directs¹³. The court must pass the final account of a receiver from the date of the receiver's last account or, if no account of his has previously been passed, from the date of his appointment, unless in the court's opinion the passing of such accounts may properly be dispensed with¹⁴.

The above rules as to accounts¹⁵ apply, to the extent directed by the court, to any person directed or authorised to do any act or carry out any transaction under these powers¹⁶ as they apply to a receiver¹⁷.

1 The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). The Mental Health Act 1983 Pt VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the meaning of 'patient' in the Court of Protection Rules 2001, SI 2001/824 (as amended) see PARA 681 note 7 ante. The death of the patient, although it has the effect of terminating the appointment of the receiver, does not discharge him from liability to account for sums received in his fiduciary capacity (*Re Hill* (1863) 1 De G J & Sm 487, where an order was made enabling the administrator of a patient's estate to enforce a bond against a defaulting committee of the estate and his sureties), but after the death he no longer receives money as receiver and his surety is not liable to make good money which it was no part of his duty to receive

(*Re Walker* [1907] 2 Ch 120, CA; and see *Re Butler* (1866) 1 Ch App 607; *Re Wheater* [1928] Ch 223, CA). As to the effect of the patient's death or recovery see PARA 715 post.

3 As to the Court of Protection see PARA 676 ante.

4 Court of Protection Rules 2001, SI 2001/824, r 61(1). The receiver must render accounts in accordance with the rules during and also after his receivership: Mental Health Act 1983 s 107(2). As to the requirement for an account by a receiver and the reopening of accounts prepared by a receiver see *Bunting (Receiver of M, a patient) v W* [2005] EWHC 1274 (Ch).

5 Court of Protection Rules 2001, SI 2001/824, r 61(2).

6 Ibid r 61(3).

7 Ibid r 61(4).

8 Ibid r 62(a).

9 Ibid r 62(b).

10 Ibid r 63.

11 Ibid r 64.

12 As to the discharge of receivers see PARA 714 post.

13 Court of Protection Rules 2001, SI 2001/824, r 65(2).

14 Ibid r 65(3). If a balance is found due from the receiver or his estate, he or his personal representative (as the case may be) must pay it into court or otherwise deal with it as the court may direct: r 65(4) (amended by SI 2001/2977). If a balance is found due to the receiver or his estate, it must be paid to him or his personal representatives (as the case may be) by the patient or out of the patient's estate: Court of Protection Rules 2001, SI 2001/824, r 65(5). On payment of any balance found due from the receiver, or if no balance has been found due from him or the passing of his accounts has been dispensed with under r 65(3), the security of the receiver must be discharged: r 65(6) (amended by SI 2004/1291).

15 Ie the Court of Protection Rules 2001, SI 2001/824, rr 61-65 (as amended).

16 Ie ibid r 8 (as amended), r 42(1)(a), (b): see PARAS 704 ante, 727 post.

17 Mental Health Act 1983 s 106(2); Court of Protection Rules 1984 r 66 (amended by SI 2004/1291).

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(iv) Receivers and Authorised Persons/714. Discharge of receiver.

714. Discharge of receiver.

The following provisions have effect until a day to be appointed¹. A receiver must be discharged if the judge² is satisfied that the person for whom the receiver was appointed has become capable of managing and administering his property and affairs, and may be discharged by order of the judge at any time if the judge considers it expedient to do so³. On the patient's⁴ death the receiver is discharged without any order⁵.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the judge see PARA 674 ante.

3 Mental Health Act 1983 s 99(3). While the patient may not be fully recovered, he may be capable of managing his property because of its size and nature. Discharge from compulsory admission to hospital or guardianship (see the Mental Health Act 1983 ss 72-75 (as amended); and PARA 460 et seq ante) does not affect the order appointing the receiver. As to the power to direct an application by an officer of the court or the Official Solicitor for the discharge of a receiver see PARA 735 post. 'Expedient' means expedient for the patient; it is not right to consider if it would be to the advantage or disadvantage of the receivership: *Re N* [1977] 2 All ER 687, [1977] 1 WLR 676, CA. On an application for the discharge of the receiver and the restoration to the patient of his own affairs the rules of natural justice, but not the rules of evidence, apply: *Re WLW* [1972] Ch 456, [1972] 2 All ER 433, Ct of Protection.

4 For the meaning of 'patient' see PARA 681 ante.

5 Mental Health Act 1983 s 99(3).

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(v) Death or Recovery of Patient/715. Effect of patient's death.

(v) Death or Recovery of Patient

715. Effect of patient's death.

Proceedings in the Court of Protection¹ are in general abated on the death of the patient² until his personal representative has been duly constituted³. Until a day to be appointed⁴, in suitable circumstances, an order may be made providing for the raising of inheritance tax, or an order may be made to pass the receiver's accounts⁵, or an order may be made under the rules relating to the disposal of property where the estate does not exceed £5,000⁶. Directions may also be given pending the notification of a grant of representation for the transfer into court of any money or securities belonging to a patient and not already in court when he died⁷. Costs properly incurred before the death will not be referred for taxation until a representative is constituted⁸.

1 As to the Court of Protection generally see PARA 676 ante.

2 *Re C* [1960] 1 All ER 393, [1960] 1 WLR 92, Ct of Protection. As to the effect of death on the percentage charge see PARA 739 post, on an order for payment of costs see PARA 740 post, on the liability of the receiver to account see PARA 713 ante, on orders for allowances see PARA 685 ante, and on the recovery of rent accrued due after the patient's death see PARA 690 ante.

3 In exceptional cases and to prevent injustice, a direction ancillary to an order made during the patient's lifetime may be varied although after the patient's death: *Re AW* (1910) unreported; *Ex p Grimstone* (1772) Amb 706 (where a mortgage had been paid off before the patient's death, a declaration was made after the patient's death as to the person in trust for whom the land was held). However, the court has no jurisdiction to order that effect should be given to an order made prior to death: *Re Walker* [1907] 2 Ch 120, CA. The death of the patient automatically terminates the powers of the receiver: see the Mental Health Act 1983 s 99(3). See note 4 infra.

The receiver remains liable to account for money received prior to the death and his sureties remain liable in respect of such money: *Re Walker* supra.

4 The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). The Mental Health Act 1983 Pt VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

5 See the Court of Protection Rules 2001, SI 2001/824, r 65 (as amended); and PARA 713 ante.

6 See *ibid* r 74(3); and PARA 716 post.

7 See *ibid* r 74(4) (as amended); and PARA 716 post.

8 *Re Popham* (1881) 29 WR 403.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(v) Death or Recovery of Patient/716. Disposal of property on patient's death or recovery.

716. Disposal of property on patient's death or recovery.

The following provisions have effect until a day to be appointed¹. On the recovery of a patient², the Court of Protection³ may order any money, securities or other property belonging to him or forming part of his estate, or remaining under the control of the court or held under its directions, to be transferred to the person appearing entitled to it⁴. On the death of a patient the court may direct any money, securities or other property belonging to the patient or forming part of his estate, remaining under the control of, or held under the direction of the court, to be transferred to the person who appears to be entitled to it⁵. If no grant of representation has been taken out to the estate of a deceased patient and it appears to the court that the assets of the estate, after deduction of debts and funeral expenses⁶, do not exceed £5,000⁷ in value, the court may, if it thinks fit, provide for the payment of the funeral expenses out of any funds in court standing to the credit of the deceased, and order that any such funds, or the balance of them, or any other property of the patient remaining under the court's control, or held under its directions, be paid, transferred, delivered or released (as appropriate) to the personal representative of the deceased when constituted or to the person who appears to be entitled to a grant of representation to his estate⁸. The court may at any time pending the notification to it of a grant of representation to the estate of the patient direct that any money or securities which belonged to the patient when he died and were not already in court be transferred to the court⁹.

When constituted, the executor or administrator will ordinarily apply for transfer of the patient's property to himself since the court will not administer the patient's estate, nor decide between adverse claimants¹⁰. Until such an application is made, a receiver will not be ordered to hand over documents in his possession to the patient's personal representative¹¹. However, the court will not decide who is entitled to documents or funds in its custody or in the possession of the receiver¹², nor will it appoint a receiver of rents¹³, nor will it entertain an application by the personal representative against the receiver for an account¹⁴, nor, even when there is no adverse claim, can the receiver be ordered to account for rents and income accrued since the patient's death¹⁵. The solicitor in the matter may not be ordered to account for rents so accrued and received by him as such solicitor¹⁶; nor will the court interfere with the legal personal representative by ordering payment of the expenses of past maintenance¹⁷ unless a charge has already been created by the court to secure repayment of it. In all such cases, when any rights have to be ascertained or any other relief is required, a claim must be begun in the appropriate division of the High Court, and pending the result of such claim the patient's property will be retained under the jurisdiction of the Court of Protection¹⁸.

1 The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). The Mental Health Act 1983 Pt VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the meaning of 'patient' in the Court of Protection Rules 2001, SI 2001/824 (as amended) see PARA 681 note 7 ante.

3 As to the Court of Protection see PARA 676 ante.

- 4 Court of Protection Rules 2001, SI 2001/824, r 74(1).
- 5 Ibid r 74(2).
- 6 As to funeral expenses see CREMATION AND BURIAL vol 10 (Reissue) PARA 935 et seq.
- 7 See the Administration of Estates (Small Payments) (Increase of Limit) Order 1984, SI 1984/539, which as regards deaths occurring after 11 May 1984 substituted £5,000 for £1,500 in the Administration of Estates (Small Payments) Act 1965 s 1(1).
- 8 Court of Protection Rules 2001, SI 2001/824, r 74(3). As to estates exempt from the necessity for grants of representation see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 186 et seq.
- 9 Court of Protection Rules 2001, SI 2001/824, r 74(4) (amended by SI 2001/2977).
- 10 *Re Ferrior, Carrow v Ferrior, Dunn v Ferrior* (1867) 3 Ch App 175 at 181.
- 11 *Re Hinchliffe* [1895] 1 Ch 117, CA.
- 12 *Ex p Gilbert* (1810) 1 Ball & B 297; *Wigg v Tiler* (1779) 2 Dick 552.
- 13 *Re Ferrior, Carrow v Ferrior, Dunn v Ferrior* (1867) 3 Ch App 175.
- 14 *Grosvenor v Drax* (1833) 2 Knapp 82, PC.
- 15 *Re Butler* (1866) 1 Ch App 607; *Re Walker* [1907] 2 Ch 120, CA; and see PARA 713 note 2 ante.
- 16 *Re Butler* (1866) 1 Ch App 607.
- 17 *Re Marman's Trusts* (1878) 8 ChD 256, CA; and see *Re Wheeler* [1928] Ch 223, CA.
- 18 *Wigg v Tiler* (1779) 2 Dick 552.

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674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(v) Death or Recovery of Patient/717. Claim for an account in the Chancery Division.

717. Claim for an account in the Chancery Division.

A claim can be maintained in the Chancery Division against a receiver for an account of his dealings with a deceased patient's estate¹, and when there are adverse claims to the estate the receiver may without prejudice to any question of title be restrained from interfering with the rents under colour of the authority vested in him as receiver²; but he will not be so restrained when he has entered into and taken possession as an adverse claimant and not as receiver³.

¹ *Scammell v Light* (1862) 7 LT 414; and see also *Re Butler* (1866) 1 Ch App 607; *Re Walker* [1907] 2 Ch 120, CA; *Strangways v Read* [1898] 2 Ch 419. Where the receiver has properly accounted in the Court of Protection, and no question of fraud or misrepresentation arises, it is doubtful whether he can be called upon to account in the Chancery Division: *Strangways v Read* supra; and see Theobald's Law relating to Lunacy 360. As to the effect of death on the liability of the receiver to account see PARA 713 ante. As to the Chancery Division of the High Court see COURTS vol 10 (Reissue) PARA 611.

² *Re Fitzgerald* (1805) 2 Sch & Lef 432; *Re Butler* (1866) 1 Ch App 607.

³ *Re Butler* (1866) 1 Ch App 607.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(vi) Jurisdiction in relation to Trusts/718. Leave to appoint new trustee in place of patient.

(vi) Jurisdiction in relation to Trusts

718. Leave to appoint new trustee in place of patient.

Where a trustee is incapable of acting, various powers exist to appoint a new trustee in his place without resort to the court¹. However, if the trustee is incapable of exercising his functions by reason of mental disorder² and is also entitled to some beneficial interest³ in the trust property, no appointment out of court of a new trustee in his place can be made, except by a person or persons nominated by the trust instrument for the purpose, unless the authority having jurisdiction under Part VII of the Mental Health Act 1983⁴ has given leave⁵.

¹ See PARA 626 ante; and TRUSTS vol 48 (2007 Reissue) PARA 836.

² For the meaning of 'mental disorder' see the Mental Health Act 1983 s 1(2), (3); and PARA 402 ante. This meaning is applied by the Trustee Act 1925 s 36(9) (substituted by the Mental Health Act 1959 s 149(1), Sch 7 Pt I; and amended by the Mental Health Act 1983 s 148(1), Sch 4 para 4(a)). As from a day to be appointed, the Trustee Act 1925 s 36(9) (as amended) is further amended so as to refer to lacking capacity rather than being incapable by reason of mental disorder and to the Court of Protection rather than to the relevant authority under the Mental Health Act 1983: see the Trustee Act 1925 s 36(9) (prospectively amended by the Mental Capacity Act 2005 s 67(1), Sch 6 para 3(1), (2)(b)). At the date at which this volume states the law no such day had been appointed. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

³ For the meaning of 'beneficial interest' see PARA 721 note 11 post.

⁴ Ie the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed). As to the construction of references to the authority see PARA 675 ante. Part VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post.

⁵ Trustee Act 1925 s 36(9) (as substituted and amended; prospectively amended (see note 2 supra)). As to the necessity for the appointment of a new trustee before a legal estate is dealt with under a trust see PARA 626 ante.

No person other than a co-trustee, or other person with power to appoint a new trustee, may make an application to the court under s 36(9) (as substituted and amended; prospectively amended) for leave to appoint a new trustee in place of a patient: Court of Protection Rules 2001, SI 2001/824, r 16. The court may direct either the receiver or the Official Solicitor to represent the patient: rr 13, 14; and see PARA 748 post. Subject to r 14, the court has power to determine what persons are to be entitled to attend at any stage in the proceedings: r 38. As to the costs of an application see PARA 740 post. The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (as amended; prospectively amended), which is to be repealed by the Mental Capacity Act 2005 (see note 4 supra), and will be replaced by new rules under s 51 (see PARAS 750, 752 post).

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(vi) Jurisdiction in relation to Trusts/719. Exercise of the power of appointing new trustees, or of retiring, on behalf of a patient.

719. Exercise of the power of appointing new trustees, or of retiring, on behalf of a patient.

The following provisions have effect until a day to be appointed¹. If the power of appointing new trustees² is vested in the patient³, the judge⁴ may give authority to exercise the power⁵. The power of retiring from a trust⁶ may be exercised on behalf of a patient under the same jurisdiction⁷. The judge may also make any necessary vesting or other orders consequent on the exercise of the power⁸.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 le under the trust instrument or the Trustee Act 1925 s 36(1): see PARA 626 ante; and TRUSTS vol 48 (2007 Reissue) PARA 836 et seq.

3 For the meaning of 'patient' see PARA 681 ante.

4 As to the judge see PARA 674 ante.

5 See the Mental Health Act 1983 s 96(1)(k); and PARAS 683, 701 ante. See also *Re Shortridge* [1895] 1 Ch 278, CA; *Re Blake* [1887] WN 173, CA. The provisions of the Court of Protection Rules 2001, SI 2001/824, r 15 (see PARA 721 post) apply with such modifications as may be necessary to an application for an order for the exercise of any power vested in a patient of appointing trustees or retiring from a trust: r 17. As to the form of application see r 7(1), Schedule Form A; and PARA 726 post. The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) (see note 1 supra), and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post).

6 See the Trustee Act 1925 s 39 (as amended); and TRUSTS vol 48 (2007 Reissue) PARA 891.

7 See the Mental Health Act 1983 s 96(1)(k); and PARAS 683, 701 ante. As to the parties to an application see the Court of Protection Rules 2001, SI 2001/824, rr 15, 17; and PARA 728 post.

8 Mental Health Act 1983 s 96(2). The orders which may be made include any order which could have been made under the Trustee Act 1925 Pt IV (ss 41-63A) (as amended) (see TRUSTS vol 48 (2007 Reissue) PARA 830). See also the Trustee Act 1925 s 54(2)(c) (as substituted; prospectively amended); and PARA 721 post. An authority to exercise a power of appointment, and a prospective vesting order to operate when the appointment has been made, may be made in one order: *Re Shortridge* [1895] 1 Ch 278, CA.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(vi) Jurisdiction in relation to Trusts/720. Appointment of new trustees by the court.

720. Appointment of new trustees by the court.

In general the Court of Protection¹ has no power to appoint a trustee if the High Court has power to do so², but it may do so³ in the cases where it has concurrent jurisdiction⁴.

1 As to the Court of Protection generally see PARA 676 ante.

2 As to the power of the High Court to appoint a new trustee in place of a trustee who is incapable by reason of mental disorder of exercising his functions as such see PARA 626 ante. As to the general exclusion of the jurisdiction of the Court of Protection in cases where the High Court has power to make an order under the Trustee Act 1925 s 54(1) (as substituted and amended; prospectively substituted) see PARA 721 post.

3 See PARA 721 note 6 post.

4 See the Trustee Act 1925 s 54(2) (as substituted; prospectively amended). See in particular s 54(2)(a), (d); and PARA 721 post. As to leave to appoint a new trustee in place of a patient see PARA 718 ante. As to the authorisation of the exercise of a power of appointment vested in a patient see PARA 719 ante.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(vi) Jurisdiction in relation to Trusts/721. Jurisdiction in relation to patients who are trustees.

721. Jurisdiction in relation to patients who are trustees.

In general the authority having jurisdiction under Part VII of the Mental Health Act 1983¹ has no power to make any order, or give any direction or authority, in relation to a patient² who is a trustee if the High Court has power under the Trustee Act 1925³ to make an order to the like effect⁴.

However, where a patient is a trustee and a receiver appointed by that authority is acting for him⁵ or an application for the appointment of a receiver has been made but not determined, the authority has concurrent jurisdiction⁶ with the High Court as to the following matters (unless the trust is subject to an order for administration made by the High Court)⁷: (1) mortgaged property of which the patient has become a trustee merely by reason of the mortgage having been paid off⁸; (2) matters consequent on the making of provision by the authority for the exercise of a power of appointing trustees or retiring from a trust⁹; (3) matters consequent on the making of provision by the authority for the carrying out of any contract entered into by the patient¹⁰; and (4) property to some interest in which the patient is beneficially entitled¹¹, but which, or some interest in which, is held by the patient under an express, implied or constructive trust¹².

An application in a case falling within the concurrent jurisdiction may be made by the receiver for the patient¹³, any person who has made an application for the appointment of a receiver which has not yet been determined, a continuing trustee or any other person who, according to the practice of the Chancery Division, would have been entitled to make the application if it had been made in the High Court¹⁴.

1 I.e. the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended). As to the construction of references to the authority see PARA 675 ante. Part VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 'Patient', in the Trustee Act 1925 s 54 (as substituted and amended; prospectively amended), means a patient as defined by the Mental Health Act 1983 s 94(2) (see PARA 681 ante), or a person as to whom powers are exercisable and have been exercised under s 98 (see PARA 684 ante); Trustee Act 1925 s 54(3) (substituted by the Mental Health Act 1959 s 149(1), Sch 7 Pt I; and amended by the Mental Health Act 1983 s 148(1), Sch 4 para 4(c)). The Trustee Act 1925 s 54(3) (as substituted and amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 6 para 3(1), (4)(c), Sch 7 as from a day to be appointed under s 68(1). At the date at which this volume states the law no such day had been appointed. See also note 1 supra.

3 As to the powers of the High Court under the Trustee Act 1925 see Pt IV (ss 41-63A) (as amended); and TRUSTS vol 48 (2007 Reissue) PARA 830 et seq.

4 Ibid s 54(1) (substituted by the Mental Health Act 1959 s 149(1), Sch 7 Pt I; and amended by the Mental Health Act 1983 s 148(1), Sch 4 para 4(c)). As from a day to be appointed, the Trustee Act 1925 s 54(1) (as amended) is substituted so as to refer to the Court of Protection and a person lacking capacity to exercise his functions as a trustee: s 54(1) (prospectively substituted by the Mental Capacity Act 2005 s 67(1), Sch 6 para 3(1), (4)(a)). At the date at which this volume states the law no such day had been appointed. See also note 1 supra.

5 As to the appointment of receivers see PARA 704 et seq ante.

6 Under the Trustee Act 1925 s 54, as originally enacted, the concurrent jurisdiction was clearly limited to the exercise of the powers conferred by Pt IV of that Act, and it seems that under s 54(2) (as substituted; prospectively amended) the concurrent jurisdiction is similarly limited; cf s 54(1) (as substituted and amended; prospectively amended). Under the concurrent jurisdiction, in matters in relation to which it exists (see the text to notes 8-12 *infra*), not only may orders be made for the appointment of new trustees, but vesting orders may be made, authority given for the charging of remuneration by a trust corporation and the costs of an application charged on the trust estate; cf para 720 *ante*.

7 *Ibid* s 54(2) (substituted by the Mental Health Act 1959 s 149(1), Sch 7 Pt I). As from a day to be appointed, the Trustee Act 1925 s 54(2) (as substituted) is amended so as to refer to a person lacking capacity to exercise his functions as a trustee or deputy appointed by the Court of Protection (instead of referring to the patient and trustee and receiver appointed by the authority), to the Court of Protection (instead of referring to the authority), and to the person concerned (instead of referring to the patient): see s 54(2) (prospectively amended by the Mental Capacity Act 2005 Sch 6 para 3(1), (4)(b)). At the date at which this volume states the law no such day had been appointed. See also note 1 *supra*.

8 Trustee Act 1925 s 54(2)(a) (as substituted (see note 7 *supra*); prospectively amended).

9 *Ibid* s 54(2)(b) (as substituted (see note 7 *supra*); prospectively amended). See also PARA 719 *ante*.

10 *Ibid* s 54(2)(c) (as substituted (see note 7 *supra*); prospectively amended). See also PARAS 683, 698 *ante*.

11 The patient is not regarded as having a beneficial interest in the trust property for this purpose unless he has some interest in substantially all the assets of the trust: *Re Jackson* (1932) unreported. Thus if the patient's interest under a settlement is limited to a particular share which has been appropriated and set apart from the general mass of the fund, it is considered that the Court of Protection would have no jurisdiction to appoint a trustee of the settlement in place of the patient.

12 Trustee Act 1925 s 54(2)(d) (as substituted (see note 7 *supra*); prospectively amended).

13 As to the meaning of 'patient' in the Court of Protection Rules 2001, SI 2001/824 (as amended) see PARA 681 note 7 *ante*.

14 *Ibid* r 15. As to representation of the patient by the receiver or Official Solicitor see r 12 (as amended), r 13; and PARA 748 *post*. As to notification of the application to the receiver see r 19. As to the power of the court to determine persons entitled to attend at any stage of the proceedings see r 38. As to forms of application see r 7, Schedule Form A; and PARA 726 *post*. The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) (see note 1 *supra*), and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 *post*). As to the Chancery Division of the High Court see COURTS vol 10 (Reissue) PARA 611.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

721 Jurisdiction in relation to patients who are trustees

NOTE 1--Day now appointed: SI 2007/1897.

TEXT AND NOTES 7-12--Trustee Act 1925 s 54(2) further amended: Constitutional Reform Act 2005 Sch 1 para 6.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(vi) Jurisdiction in relation to Trusts/722. Variation of trusts.

722. Variation of trusts.

Applications under the Variation of Trusts Act 1958¹ are normally made to the High Court², but where the question arises whether the carrying out of any arrangement under the Act would be for the benefit of any person interested under the trust who is a patient³, that question is to be determined by the authority⁴ having jurisdiction under Part VII of the Mental Health Act 1983 and not by the High Court⁵. No application should be made to the Court of Protection to have this question determined until the claim document has been issued in the Chancery Division of the High Court and evidence filed in support, but the master will in suitable cases authorise counsel to be instructed on behalf of the patient to look after the patient's interests during negotiations for an arrangement⁶.

1 See the Variation of Trusts Act 1958 s 1(1), (2), (5); and TRUSTS vol 48 (2007 Reissue) PARA 1062 et seq.

2 The county court has jurisdiction where the estate or fund subject, or alleged to be subject, to the trust does not exceed the county court limit: County Courts Act 1984 s 23. That limit is currently £30,000: County Courts Jurisdiction Order 1981, SI 1981/1123.

3 I.e. a patient within the meaning of the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed): see ss 94(2), 112; and PARA 681 ante. Part VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

4 As to the construction of references to the authority see PARA 675 ante.

5 See the Variation of Trusts Act 1958 s 1(3) (amended by the County Courts Act 1959 s 204, Sch 3; the Mental Health Act 1959 s 149(1), Sch 7 Pt I; and the Mental Health Act 1983 s 148(1), Sch 4 para 14). As from a day to be appointed, the Variation of Trusts Act 1958 s 1(3) (as amended) is further amended so as to refer to the Court of Protection and the person lacking capacity under the Mental Capacity Act 2005, instead of the authority and the patient under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed): see the Variation of Trusts Act 1958 s 1(3) (prospectively amended by the Mental Capacity Act 2005 s 67(1), Sch 6 para 9(a)). At the date at which this volume states the law no such day had been appointed. See also note 3 supra.

See also *Re CL* [1969] 1 Ch 587, [1968] 1 All ER 1104. Nothing in the Variation of Trusts Act 1958 s 1 (as amended; prospectively amended) limits the powers of the authority having jurisdiction under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed): Variation of Trusts Act 1958 s 1(6) (amended by the Mental Health Act 1959 Sch 7 Pt I; and the Mental Health Act 1983 Sch 4 para 14). As from a day to be appointed, the Variation of Trusts Act 1958 s 1(6) (as amended) is further amended so as to refer to the powers of the Court of Protection: see s 1(6) (prospectively amended by the Mental Capacity Act 2005 s 67(1), Sch 6 para 9(b)). At the date at which this volume states the law no such day had been appointed. See also note 3 supra.

6 *Practice Note* [1959] 3 All ER 897, sub nom *Practice Direction* [1960] 1 WLR 17 para 2. However, the Court of Protection should be notified as soon as the claim document (formerly originating summons) is issued in the Chancery Division and authority sought for leave to acknowledge service and as to the appointment of a litigation friend (formerly 'guardian ad litem'): cf *Practice Note* supra para 1. Directions have been issued as to the title of the application to the Court of Protection, the service of the application, the evidence to be lodged with it and as to provision for subsequent approval of amendments to an arrangement: see *Practice Note* supra paras 3-5. Costs of proceedings in the Court of Protection will normally be allowed out of the trust funds: *Re Sanderson's Settlement Trusts* [1961] 1 All ER 25n, [1961] 1 WLR 36.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

722 Variation of trusts

NOTE 3--Day now appointed: SI 2007/1897.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(vii) Vesting and Transfer Orders/723. Vesting orders on settlement of property or appointment of trustees.

(vii) Vesting and Transfer Orders

723. Vesting orders on settlement of property or appointment of trustees.

The judge¹ may make consequential vesting orders if provision is made for the settlement of a patient's property or the exercise of a power vested in a patient of appointing new trustees or retiring from a trust². Vesting orders may also be made when the Court of Protection³ has concurrent jurisdiction with the High Court to appoint new trustees⁴.

1 As to the judge see PARA 674 ante.

2 See PARAS 692, 719 ante.

3 As to the Court of Protection see PARA 676 ante.

4 The Court of Protection has no jurisdiction to make a vesting order in respect of settled land, as such an order would be made under the Settled Land Act 1925 s 12 (as amended) (see SETTLEMENTS vol 42 (Reissue) PARA 699) (and not the Trustee Act 1925 s 44: see TRUSTS vol 48 (2007 Reissue) PARAS 875-876) and so would not be within the concurrent jurisdiction afforded by the Trustee Act 1925 s 54(2) (as substituted; prospectively amended): see PARA 721 ante.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(vii) Vesting and Transfer Orders/724. Transfer orders as to stock.

724. Transfer orders as to stock.

The following provisions have effect until a day to be appointed¹. Where any stock² is standing in the name of a patient³ beneficially entitled to it, or in the name of a receiver in trust for him, or as part of his property, and the receiver dies intestate or himself becomes incapable by reason of mental disorder⁴ of acting as receiver or is out of the jurisdiction, or it is uncertain whether the receiver is still alive, or he neglects or refuses to transfer the stock or to receive and pay over the dividends as the court directs, the Court of Protection⁵ may order some proper person to transfer⁶ the stock into the name of the receiver or, as the case may be, a new receiver for the patient, or into court or otherwise deal with it, and also to receive and pay over the dividends as the court directs⁷.

1 The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). The Mental Health Act 1983 Pt VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 'Stock' includes shares and also any fund, annuity or security transferable in the books kept by any body corporate or unincorporated company or society, or by an instrument of transfer either alone or accompanied by other formalities, and includes any dividends paid in respect of them: Court of Protection Rules 2001, SI 2001/824, r 2(1) (amended by SI 2001/2977).

3 As to the meaning of 'patient' for these purposes see PARA 681 note 7 ante.

4 For the meaning of 'mental disorder' see PARA 402 ante.

5 As to the Court of Protection generally see PARA 676 ante.

6 Where an order is made under this power or under the Mental Health Act 1983 s 100 (see PARA 725 post) directing stock to be transferred into court, the person required to effect the transfer is: (1) in the case of stock standing in the stock register kept by the Registrar of Government Stock or any bank or by the Crown Agents for Overseas Governments and Administrations, some proper officer of the Registrar of Government Stock, the bank or the Crown Agents; or (2) in any other case, some proper officer of the company or other body, the stock of which is to be transferred: Court of Protection Rules 2001, SI 2001/824, r 73(2)(a), (b) (amended by SI 2001/2977; SI 2004/1662). That person must, if so ordered, receive any sum accrued due before the transfer by way of dividend, bonus or periodical payment in respect of the stock and pay it into court to the general account of the patient or to a separate account or otherwise deal with it, according as the court may direct: Court of Protection Rules 2001, SI 2001/824, r 73(2).

7 Ibid r 73(1). An order directing lodgment in court of securities, but payment of accrued dividends to date of lodgment direct to the receiver, is valid and may safely be acted upon by the bank or other company in whose possession the accrued dividends may be: *Re Spurling* [1909] 1 Ch 199, CA. See also *Re Shewell* (1904) cited in *Re Spurling* supra at 201. Although there is also power to order payment of future dividends by the bank to the receiver without lodging the corpus in court, the more usual and proper practice is to order the stocks themselves to be transferred into court into the name of the Accountant General and to direct him to pay the future dividends to the receiver: *Re Auchmuty* (1908) 99 LT 462, CA. As to protection for acts done in pursuance of the Mental Health Act 1983 see PARA 407 ante.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(3) JURISDICTION OF SPECIAL JUDICIARY AND COURT OF PROTECTION/(vii) Vesting and Transfer Orders/725. Vesting of stock in curator outside jurisdiction.

725. Vesting of stock in curator outside jurisdiction.

The following provisions have effect until a day to be appointed¹. Where the judge² is satisfied: (1) that under the law prevailing in a place outside England and Wales³ a person has been appointed to exercise powers with respect to the property or affairs of any other person on the ground, however formulated⁴, that that other person is incapable, by reason of mental disorder⁵, of managing and administering his property and affairs⁶; and (2) that having regard to the nature of that appointment and to the circumstances of the case it is expedient that the judge should exercise his powers, the judge may direct any stock⁷ standing in the name of that other person, or the right to receive the dividends⁸, to be transferred into the name of the person so appointed, or otherwise dealt with as requested by that person, and may give such directions as the judge thinks fit for dealing with the accrued dividends⁹.

Before the court will order the capital to be transferred to the foreign curator it must as a rule be shown that it is wanted for the maintenance of the person suffering from mental disorder¹⁰. Where it is not required for maintenance, then, unless special circumstances can be shown, the dividends only will be paid¹¹.

The Chancery Division has jurisdiction to order a transfer and will do so in a proper case where no application is in fact made in the Court of Protection¹². The foreign curator may apply in his own name without joining the person suffering from mental disorder¹³.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the judge see PARA 674 ante.

3 For the meaning of 'England' see PARA 405 note 6 ante; and for the meaning of 'Wales' see PARA 405 note 7 ante.

4 In deciding as to the validity of the appointment, the court will look to the substance rather than to the form: *Didisheim v London and Westminster Bank* [1900] 2 Ch 15, CA; *Pélegrin v Coutts & Co*, *Pélegrin v L Messel & Co* [1915] 1 Ch 696. See also *Re Tarratt* (1884) 51 LT 310, CA (omission from appointment of declaration as to unsoundness of mind).

5 For the meaning of 'mental disorder' see PARA 402 ante.

6 Mental Health Act 1983 s 100(1)(a).

7 'Stock' includes shares and any fund, annuity or security transferable in the books kept by any body corporate or unincorporated company or society, or by an instrument of transfer either alone or accompanied by other formalities; and 'dividends' is to be construed accordingly: *ibid* s 100(2).

8 See note 7 supra.

9 Mental Health Act 1983 s 100(1). As to the person required to effect a transfer under the Mental Health Act 1983 see PARA 724 note 6 ante.

10 *Re Brown* [1895] 2 Ch 666, CA; *Re Knight* [1898] 1 Ch 257, CA; *Re De Larragoiti* [1907] 2 Ch 14.

11 *Re Stark* (1850) 2 Mac & G 174; *Re Elias* (1851) 3 Mac & G 234; *Re Garnier* (1872) LR 13 Eq 532; *Re Mitchell* (1881) 17 ChD 515, CA; *New York Security and Trust Co v Keyser* [1901] 1 Ch 666.

12 *Didisheim v London and Westminster Bank* [1900] 2 Ch 15, CA. As to the Chancery Division of the High Court generally see COURTS vol 10 (Reissue) PARA 611.

13 *Thiery v Chalmers, Guthrie & Co* [1900] 1 Ch 80. See also PARA 637 ante.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(4) PROCEDURE/726. Mode of application.

(4) PROCEDURE

726. Mode of application.

The following provisions have effect until a day to be appointed¹. A first application for the appointment of a receiver must be made in the prescribed form² but an application to the court in respect of the exercise of any of its other jurisdiction in relation to a patient³ may be made by letter unless the court directs that a formal application must be made⁴. On grounds of urgency the court may dispense with the need for an application in writing⁵. The court may allow one application to be made in respect of two or more patients or may consolidate applications relating to two or more patients, if in its opinion the proceedings can be conveniently carried on together⁶.

Where a relevant application⁷ is made the applicant, or such other person as the court may direct, must give notice to the patient as follows⁸:

- 174 (1) such notice must consist of notice:
7
 - 15. (a) that an application has been made⁹;
 - 16. (b) of the effect, if made, of the appointment of a receiver, in the case of a first application for appointment of a receiver, or such other order, direction or certificate as may have been applied for¹⁰;
 - 17. (c) of the identity of the applicant and, if different, that of any proposed receiver¹¹;
 - 18. (d) of any hearing fixed by the court¹²; and
 - 19. (e) of such other information as the court may direct¹³;
- 8
- 175 (2) such notice must be given to the patient personally¹⁴;
- 176 (3) where the court has fixed a hearing, the relevant time limits¹⁵ apply to the giving of such notice¹⁶.

Where the patient is a minor, the notification must be given to his parent or guardian or, if he has no parent or guardian, to the person with parental responsibility within the meaning of the Children Act 1989¹⁷.

1 The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). The Mental Health Act 1983 Pt VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 See the Court of Protection Rules 2001, SI 2001/824, r 7(1), Schedule Form A. An application for appointment of a receiver is treated as an application for the appointment as receiver of the person named in the application or some other suitable person: r 7(2). Unless the court directs otherwise, the applicant must file a medical certificate and evidence of family and property: r 34(1)(a). In rule 34, 'evidence of family and property' means a certificate or, if the court so orders in a particular case, an affidavit, giving particulars of the patient's relatives and such other persons as the court may direct, property and affairs and of the circumstances giving rise to the application: r 34(2).

3 As to the meaning of 'patient' for these purposes see PARA 681 note 7 ante.

4 As to the form of formal applications see the Court of Protection Rules 2001, SI 2001/824, r 7(1), Schedule Form A. A formal application is required for the following relief (*Practice Direction* [1985] 1 All ER 642, [1985] 1 WLR 309): (1) the settlement or gift of any property of a patient pursuant to the Mental Health Act 1983 s 96(1) (d) (see PARA 692 et seq ante), other than gifts of amounts falling within the current limits for exemption from inheritance tax or qualifying for the exemption for gifts in consideration of marriage or within the patient's normal expenditure (see INHERITANCE TAXATION); (2) the execution of a will or codicil under s 96(1)(e) (see PARA 695 ante); (3) the exercise of any power (including a power to consent) vested in the patient under s 96(1)(k) (see PARA 701 ante); (4) the appointment of a new receiver under s 99 (see PARA 704 et seq ante); (5) the appointment of new trustees under the Trustee Act 1925 s 36(9) (as amended; prospectively amended) where the appointment is made subsequently to or separately from the first application for such an appointment (see PARA 718 ante); (6) the appointment of new trustees under s 54 (as substituted and amended; prospectively amended) (see PARA 720 ante); (7) an order for the execution of deeds of family arrangement under the Variation of Trusts Act 1958 s 1(3) (as amended; prospectively amended) (see PARA 722 ante). As to method of application and procedure in relation to orders for settlement of personal injury awards to patients see *Court of Protection Practice Note* (1994) 138 Sol Jo LB 108.

Where an application is amended (under the Court of Protection Rules 2001, SI 2001/824, r 51 or r 52) a note must be placed on it showing the date on which it was amended and the alterations must be sealed: r 53.

5 Ibid r 7(3).

6 Ibid r 10; cf *Re Morris* [1912] 1 Ch 730 at 734.

7 For these purposes, 'relevant application' means an application for any order, direction or certificate exercising the court's jurisdiction in respect of a patient, including an application for the appointment of a receiver: Court of Protection Rules 2001, SI 2001/824, r 24(1) (substituted by SI 2001/2977).

8 Court of Protection Rules 2001, SI 2001/824, r 24(1A) (added by SI 2001/2977). This is subject to the Court of Protection Rules 2001, SI 2001/824, r 24(1B), (1BB) (as added and amended) these provisions are themselves subject to r 24(1C) (as added). Rule 24(1A) (as added) does not apply where a relevant application ('the previous relevant application') has already been made in respect of the same patient unless there has been any finding by the court since the previous relevant application was made that the patient is capable of managing and administering his property and affairs, or where an enduring power of attorney created by the patient has been registered and the registration has not been cancelled: r 24(1B) (added by SI 2001/2977; and amended by SI 2002/833). The Court of Protection Rules 2001, SI 2001/824, r 24(1A) (as added) does not apply to a relevant application where the court is of the opinion that it is necessary to make an immediate order directing or authorising any person to do any act or carry out any transaction on behalf of a patient, and directs that notice to the patient may be dispensed with: r 24(1BB) (added by SI 2002/833). The Court of Protection Rules 2001, SI 2001/824, r 24(1A) (as added) in any case applies where the relevant application is a first application for the appointment of a receiver except where the court is of the opinion, on the application, that it is necessary to appoint an interim receiver for the patient under r 42(1)(b) (see PARA 704 ante): r 24(1C) (added by SI 2001/2977; amended by SI 2005/667).

9 Court of Protection Rules 2001, SI 2001/824, r 24(1D)(a) (r 24(1D) added by SI 2001/2977).

10 Court of Protection Rules 2001, SI 2001/824, r 24(1D)(b) (as added: see note 9 supra).

11 Ibid r 24(1D)(c) (as added: see note 9 supra).

12 Ibid r 24(1D)(d) (as added: see note 9 supra).

13 Ibid r 24(1D)(e) (as added: see note 9 supra).

14 Ibid r 24(1E) (added by SI 2001/2977).

15 Ie the time limits set out in the Court of Protection Rules 2001, SI 2001/824, r 19(5): see PARA 729 post.

16 Ibid r 24(1F) (added by SI 2001/2977).

17 Court of Protection Rules 2001, SI 2001/824, r 24(2). As to parental responsibility under the Children Act 1989 see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 134 et seq.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(4) PROCEDURE/727. Exercise of jurisdiction without appointing a receiver: the 'short procedure'.

727. Exercise of jurisdiction without appointing a receiver: the 'short procedure'.

The following provisions have effect until a day to be appointed¹. Where it appears to the Court of Protection² that a patient's property does not exceed £16,000 or that it is otherwise appropriate, and the court is of the opinion that it is not necessary to appoint a receiver for a patient³, the court may make a short order or direction whether or not the application was made for the appointment of a receiver for the patient⁴. Such a short order or direction is an order or direction directing an officer of the court or some other suitable person named in the order or direction to deal with patient's property (or any part of it) or with his affairs in any manner authorised by the Mental Health Act 1983 and specified in the order or direction⁵.

¹ The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). The Mental Health Act 1983 Pt VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

² As to the Court of Protection see PARA 676 ante.

³ As to the meaning of 'patient' for these purposes see PARA 681 note 7 ante.

⁴ See the Court of Protection Rules 2001, SI 2001/824, r 8(1)(a), (b) (amended by SI 2001/2977). The Court of Protection Rules 2001, SI 2001/824, r 8(1) (as amended) is subject to r 6: see PARA 705 ante.

⁵ Ibid r 8(3). Generally an application proceeds on the same lines as an application for the appointment of a receiver (see r 24 (as amended), r 34; and PARAS 704 et seq, 726 ante) and the person so authorised or directed to do any act or carry out any transaction is accountable to the court: see r 66 (amended by SI 2004/1291).

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(4) PROCEDURE/728. Parties.

728. Parties.

The following provisions have effect until a day to be appointed¹. Except where the Court of Protection Rules 2001² otherwise provide or the Court of Protection³ otherwise directs⁴, notice of the hearing of the application must be served on all persons who would otherwise have been required to be served with the application notice if the application had been made to the High Court⁵. Notice must also be given to such other persons who appear to the court to be interested as the court may specify⁶. Where a receiver has been appointed for a patient he must, unless he is the applicant, be given notice of the hearing of any application relating to the patient⁷; notice must also be given where the application is made for the appointment of new trustees or for an order for exercise of any power vested in a patient of appointing a trustee or retiring from a trust⁸.

Except as provided by the special rules relating to applications under the Trustee Act 1925⁹ and the rules relating to applications for the execution of a will on behalf of a patient¹⁰, an application on behalf of a patient for whom a receiver has been appointed is, unless the court otherwise directs, to be made by the receiver in his own name¹¹; and, subject to any directions given by the court, a patient for whom a receiver has been appointed may be represented by the receiver at any hearing of which the patient has been given notice¹². A minor or patient for whom no receiver has been appointed must not make an application in proceedings relating to another person except by his litigation friend and must not resist an application in such proceedings except by his litigation friend¹³.

Where two or more parties are represented by the same legal representative, the court may, if it thinks fit, require any of them to be separately represented¹⁴. Where two or more persons having the same interest in relation to the matter to be determined attend any hearing by separate legal representatives, they must not be allowed more than one set of costs of the hearing unless the court certifies that the circumstances justify separate representation¹⁵.

1 The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). The Mental Health Act 1983 Pt VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 I.e. the Court of Protection Rules 2001, SI 2001/824 (as amended): see PARA 677 ante.

3 As to the Court of Protection see PARA 676 ante.

4 See the Court of Protection Rules 2001, SI 2001/824, r 19(1).

5 Ibid r 19(3). The application is one to which r 15 or r 17 relates: see PARA 719 ante. In an application for a will under the statutory powers (see PARAS 695-696 ante), all prospective legatees under an existing will are joined: see *Re HMF* [1976] Ch 33, [1975] 2 All ER 795, Ct of Protection; applied in *Re B* [1987] 2 All ER 475, [1987] 1 WLR 552.

6 Court of Protection Rules 2001, SI 2001/824, r 19(4).

7 Ibid r 19(2). As to the meaning of 'patient' for these purposes see PARA 681 note 7 ante.

8 See PARAS 683, 701 ante.

9 See PARAS 718-722 ante.

10 As to applications for the execution of a will of a patient see the Court of Protection Rules 2001, SI 2001/824, r 18; and PARA 695 ante.

11 Ibid r 12(1) (amended by SI 2001/2977).

12 Court of Protection Rules 2001, SI 2001/824, r 12(2). Where in any proceedings the court considers that the interests of a patient for whom a receiver has been appointed are not adequately represented by the receiver, it may direct the Official Solicitor (with the latter's consent) to act as solicitor for the patient either generally in the proceedings or for any particular purpose connected with them; the Official Solicitor need not be appointed receiver or litigation friend (formerly 'guardian ad litem'): r 13. As to the Official Solicitor see PARA 748 post.

13 Ibid r 14(1), (2). Where a person is to be appointed litigation friend (formerly 'next friend' or 'guardian ad litem') of a minor or a patient for whom no receiver has been appointed (ie a person under a disability) in substitution for the person previously acting as litigation friend, the appointment must be made by the court but, except for this, an order of the court appointing a litigation friend of a person under a disability is not necessary: r 14(3). Before the name of any person can be used in any proceedings as litigation friend there must be filed: (1) a written consent to act; and (2) a certificate as to specified matters by the solicitor acting for the minor or patient: r 14(4). Those matters are: (a) that he knows or believes that the person to whom the certificate relates is a minor or patient giving (in the case of a patient) the grounds of his knowledge or belief; and (b) except where the person named in the certificate is the Official Solicitor, that the person so named has no interest in the proceedings adverse to that of the person under a disability: see r 14(4)(b)(i), (ii).

14 Ibid r 39.

15 Ibid r 87. As to the level of fixed costs recoverable by solicitors representing parties in Court of Protection proceedings see *Practice Note* (2001) 151 NLJ 21.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(4) PROCEDURE/729. Service of documents.

729. Service of documents.

The following provisions have effect until a day to be appointed¹. Notice of the hearing must be given: (1) in the case of a first application for the appointment of a receiver or an application for leave to appoint a new trustee, not less than ten clear days² before the date fixed for the hearing³; and (2) in the case of any other application, not less than two clear days before the day fixed for the hearing⁴. Notice is also given in such other matter as the court may direct⁵. In general any document required to be served on a person must be served by delivering it to him personally, by sending it to him by first class post or through a document exchange at his last known address, or by transmitting it to him at his last known address by fax or other electronic means⁶.

¹ The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). The Mental Health Act 1983 Pt VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

² Where a period of time fixed by the Court of Protection Rules 2001, SI 2001/824 (as amended) or by any order or direction of the court for doing an act expires on a day on which the court office for doing that act is closed and for that reason the act cannot be done on that day, the act is done in time if done on the next day on which that office is open: r 4(1). Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date: r 4(2). Where any period of time as mentioned in r 4(1) is less than six days, any day on which the court office is closed is not to be included in that computation: r 4(3). The court may extend or abridge the time limited by the Court of Protection Rules 2001, SI 2001/824 (as amended) or any order or direction of the court for doing any act or taking any proceedings upon such terms as the court thinks fit and notwithstanding, in the case of an extension, that the time so limited has expired: r 5.

³ Ibid r 19(5)(a).

⁴ Ibid r 19(5)(b).

⁵ Ibid r 19(6).

⁶ Ibid r 20. However, provision is made for acceptance of service by a person's solicitor on his behalf (see r 20), for the making of an order for substituted service where normal service is impracticable (see r 22) and for the service of documents required to be served on a minor or patient (see r 23). Except where the court in its discretion orders affidavit evidence, evidence as to service is by signed certificate: see r 26 (amended by SI 2001/2977).

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(4) PROCEDURE/730. Evidence.

730. Evidence.

The following provisions have effect until a day to be appointed¹. The Court of Protection² may accept and act upon a statement of facts or other evidence, whether oral or written, as the court considers sufficient, although not given on oath and whether or not it would be otherwise admissible in a court of law³. Except where it is otherwise provided, evidence is to be given by affidavit⁴; but the court may accept or act upon a statement of facts or such other evidence, whether oral or written, as it considers sufficient, although not given on oath and whether or not it would be otherwise admissible in a court of law, and may give directions as to the manner in which evidence in any proceedings is to be given⁵. A person who has made an affidavit may be ordered by the court to attend for cross-examination⁶. Where at any stage of proceedings relating to a patient⁷ the court has reason to believe that he has died or recovered, it may require evidence of the death or recovery to be furnished by such party to the proceedings as it thinks appropriate⁸. The court may direct that an oath be administered to any witness or interpreter in any proceedings before the court⁹.

Except where the court otherwise directs, evidence which has been used in any proceedings relating to a patient may be used at any subsequent stage of those proceedings or in any other proceedings relating to the same patient or to another member of his family¹⁰.

1 The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). The Mental Health Act 1983 Pt VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the Court of Protection see PARA 676 ante.

3 Court of Protection Rules 2001, SI 2001/824, r 28(1).

4 Ibid r 27(1). When evidence by affidavit is required it must conform with the requirements of the Practice Direction issued by the Lord Chief Justice in respect of the Court of Appeal and all divisions of the High Court: *Practice Direction* [1984] 3 All ER 128, [1984] 1 WLR 1171 (following *Practice Note* [1983] 3 All ER 33, sub nom *Practice Direction* [1983] 1 WLR 922). As to evidence on an originating application for the appointment of a receiver or the authorisation of a person to act on a patient's behalf see the Court of Protection Rules 2001, SI 2001/824, r 34; and PARA 726 ante.

5 Ibid r 28. Any such evidence or other evidence must be drawn up in numbered paragraphs and dated and signed by the person to whom it is given: see r 28(2). The court may allow written questions to be put to a Lord Chancellor's Visitor: see r 29; and PARA 747 post. As to the nature of visitors' reports, their disclosure and the liability of visitors to be examined and cross-examined see *Re WLW* [1972] Ch 456, [1972] 2 All ER 433, Ct of Protection.

6 Court of Protection Rules 2001, SI 2001/824, r 30.

7 For the meaning of 'patient' see PARA 681 ante.

8 See the Court of Protection Rules 2001, SI 2001/824, r 35.

9 Ibid r 31.

10 Ibid r 33(1). The master may, upon application, authorise the use of any such evidence in any legal proceedings that he may specify: r 33(2). See also *Re E (Mental Health Patient)* [1985] 1 All ER 609, [1985] 1 WLR 245, CA (authority of Court of Protection required for release to patient's parent of papers relating to High

Court proceedings in which Official Solicitor had acted as patient's litigation friend, even though papers were patient's property). As to the Official Solicitor see PARA 748 post.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(4) PROCEDURE/731. Hearing of proceedings.

731. Hearing of proceedings.

The following provisions have effect until a day to be appointed¹. Upon receiving an application² the Court of Protection³ must fix a hearing date unless it considers that the matter may be properly dealt with without a hearing, and upon the same ground the court may cancel a hearing⁴. Every application must be heard in chambers unless, in the case of an application for hearing by the judge, the judge otherwise directs⁵; and the court may determine who is entitled to be present at any stage⁶. Where a function of the court is not being exercised by a judge, the court, after giving such direction as it thinks fit, must refer to the judge⁷ any proceedings or any question arising in any proceedings which ought, by virtue of any enactment or in the master's opinion, to be considered by the judge⁸. The judge may refer any proceedings before him or any question in them to the master for inquiry and report⁹.

1 The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). The Mental Health Act 1983 Pt VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the manner of applications see the Court of Protection Rules 2001, SI 2001/824, r 7; and PARA 726 ante.

3 As to the Court of Protection see PARA 676 ante.

4 Court of Protection Rules 2001, SI 2001/824, r 9(1). Where a hearing is so fixed an officer must notify the applicant, by letter, of the date and time of the hearing: r 9(2). Where the court decides that the application can properly be dealt with without a hearing and a hearing is cancelled, an officer must so notify the applicant by letter: r 9(3) (added by SI 2002/833).

5 Court of Protection Rules 2001, SI 2001/824, r 37(1). The court must give such directions as it thinks fit concerning the privacy of applications made to it: r 37(2).

6 Ibid r 38. This is subject to r 14: see PARA 728 ante.

7 As to the judge see PARA 674 ante.

8 Court of Protection Rules 2001, SI 2001/824, r 40.

9 Ibid r 41. As to powers to direct inquiries see PARA 733 post.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(4) PROCEDURE/732. Attendance of witnesses and examination of patients.

732. Attendance of witnesses and examination of patients.

The following provisions have effect until a day to be appointed¹. For the purpose of any proceedings before him with respect to persons suffering or alleged to be suffering from mental disorder, the judge² has the like powers as are vested in the High Court in respect of securing the attendance of witnesses and the production of documents³. In any proceedings the Court of Protection⁴ may allow or direct any party or the Official Solicitor⁵ to take out a witness summons requiring the person named in it to attend before the court and give oral evidence or produce any document⁶.

In any proceedings relating to a patient⁷, a judge or the master of the Court of Protection may make an order for the patient's attendance at such time and place as he may direct for examination by the master, a Lord Chancellor's Visitor or any medical practitioner⁸.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the judge see PARA 674 ante.

3 Mental Health Act 1983 s 104. This power under s 104 (prospectively amended and repealed) is not affected by the power to make rules of court regulating procedure: see PARA 677 ante. As to the powers of the High Court as to the attendance of witnesses and the production of documents see CIVIL PROCEDURE vol 11 (2009) PARAS 538-583, 996 et seq. The enactments which provide a special procedure for the issue of writs of subpoena ad testificandum and subpoena duces tecum (now witness summonses: see CIVIL PROCEDURE vol 11 (2009) PARA 1004) in the High Court so as to be enforceable throughout the United Kingdom (see the Supreme Court Act 1981 s 36(1)-(4) (as amended); and CIVIL PROCEDURE vol 11 (2009) PARAS 1008, 1016) apply in relation to proceedings under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed), with the substitution for references to the High Court of references to the judge and for references to such writs of references to such document as may be prescribed by rules (see note 6 infra) for issue by the judge for securing the attendance of witnesses or the production of documents: s 104(4). This provision extends to Scotland: see s 146 (prospectively amended); and PARA 405 ante. As from a day to be appointed, s 104(4) is amended so as to refer to the Senior Courts Act 1981 instead of the Supreme Court Act 1981: see the Mental Health Act 1983 s 104(4) (prospectively amended by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2)). At the date at which this volume states the law no such day had been appointed.

The Mental Health Act 1983 s 104 (prospectively amended and repealed) applies to proceedings under the Enduring Powers of Attorney Act 1985 s 10(1) (repealed).

4 As to the Court of Protection generally see PARA 676 ante.

5 Court of Protection Rules 2001, SI 2001/824, r 48(1). The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (as amended; prospectively amended), which is to be repealed by the Mental Capacity Act 2005 (see note 1 supra), and will be replaced by new rules under s 11 (see PARAS 750, 752 post).

For other powers to direct the Official Solicitor to make applications, to conduct proceedings or to represent a patient see PARAS 728 ante, 734 post. As to the Official Solicitor see PARA 748 post; and see COURTS vol 10 (Reissue) PARA 667. As to the Official Solicitor's costs see PARA 740 post.

6 Court of Protection Rules 2001, SI 2001/824, r 48(1). An application by a party to be allowed to take out a witness summons is made by filing a statement giving specified information: see r 48(2). A witness summons must be served on the witness personally a reasonable time before the day fixed for his attendance and he is entitled to the like conduct money and payment for expenses and time as a High Court witness: r 48(3). As to the form of witness summons see Schedule Form B.

7 As to the meaning of 'patient' for these purposes see PARA 681 note 7 ante.

8 Court of Protection Rules 2001, SI 2001/824, r 50. As to the visiting of patients by the Lord Chancellor's Visitors or the master see PARA 747 post.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

732 Attendance of witnesses and examination of patients

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(4) PROCEDURE/733. Inspection and inquiries.

733. Inspection and inquiries.

The following provisions have effect until a day to be appointed¹. For the purpose of any proceedings relating to a patient's property², the Court of Protection³ may, if it thinks fit, inspect the property or direct one of its officers or, if he consents, the Official Solicitor to inspect the property, make any necessary inquiries and report to the court⁴.

The court may make, or cause to be made, inquiries whether any person has in his possession, or under his control, or has any knowledge of, any testamentary document executed by a patient, and may direct that person to answer the inquiries on oath and to produce any such document which is in his possession or under his control and deal with it in such manner as the court may direct⁵.

The court has power to cause inquiries to be made as to the desirability of the appointment of a receiver or the exercise of other powers conferred on it⁶, as to prior dealing with a patient's property⁷ and as to testamentary documents executed by a patient⁸, and to make or cause to be made any other inquiries which it may consider necessary or expedient for the proper discharge of its functions⁹.

1 The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). The Mental Health Act 1983 Pt VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 For the meaning of 'patient' for these purposes see PARA 681 ante.

3 As to the Court of Protection see PARA 676 ante.

4 Court of Protection Rules 2001, SI 2001/824, r 68. As to the Official Solicitor see PARA 748 post.

5 Ibid r 70; and see *Re Humpleby* (1829) 2 Coop temp Cott 165; *Re Thompson* (1830) 1 Russ & M 355. The practice is for the court to make a copy of any existing testamentary document for its records, and on the patient's death information as to the nomination of executors and any directions concerning the funeral or place of interment can thus be obtained without waiting for the original will to be opened. If such a document is held in safe custody by the Official Solicitor or by any bank or other person whose undertaking to hold the same subject to the direction of the court is limited to 'during the lifetime of the patient' (as is the usual practice) no authority to release is necessary. If the document is deposited under an undertaking not so limited, an authority under the seal of the court will be necessary to enable the will to be released to the executors. If the nominated executors are dead or no one is appointed the court may direct that the testamentary document be handed to those entitled to a grant of representation of the estate of the deceased patient. If the will is deposited in the Principal Registry, the document handed over is the receipt for the will. As to common form practice in probate matters see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 127 et seq.

6 See the Court of Protection Rules 2001, SI 2001/824, r 67; and PARA 705 ante.

7 See ibid r 69; and PARA 698 ante.

8 See ibid r 70.

9 Ibid r 71 (amended by SI 2001/2977). As to the judge's power to refer questions to the master for inquiry see PARA 731 ante.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(4) PROCEDURE/734. Court's powers if dissatisfied with conduct of proceedings.

734. Court's powers if dissatisfied with conduct of proceedings.

The following provisions have effect until a day to be appointed¹. If the Court of Protection² is dissatisfied with the conduct of any proceedings or the carrying out of any order or direction, whether by reason of undue delay or otherwise, it may require the person having the conduct of the proceedings or any other person appearing to be responsible to explain the delay or other cause of dissatisfaction, and may then make such order for expediting the proceedings or otherwise as may be appropriate³.

¹ The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). The Mental Health Act 1983 Pt VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

² As to the Court of Protection see PARA 676 ante.

³ Court of Protection Rules 2001, SI 2001/824, r 49(1). For these purposes, the court may direct any person to make any application and to conduct any proceedings and carry out any specified directions; and, if it thinks fit and he consents, the court may appoint the Official Solicitor to act as solicitor for the patient in the place of any solicitor previously acting: r 49(2). As to other powers to direct the Official Solicitor to initiate or conduct proceedings or to appoint him to act as solicitor see PARAS 728, 732 ante, 748 post. As to the Official Solicitor's costs see PARA 740 post. As to the Official Solicitor see PARA 748 post.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(4) PROCEDURE/735. Entry and enforcement of orders.

735. Entry and enforcement of orders.

The following provisions have effect until a day to be appointed¹. Every order, certificate, direction or authority of the Court of Protection² which is drawn up must, when entered, be sealed and filed³. Special provision is made as to the entry of orders made on applications for the appointment of receivers or directing or authorising a person to act on behalf of a patient without being appointed receiver, or orders made under the short procedure⁴ in relation to a patient's property⁵. Every writ of execution or other process for the enforcement of an order is issued out of the Central Office of the Supreme Court⁶.

1 The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). The Mental Health Act 1983 Pt VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the Court of Protection see PARA 676 ante.

3 Court of Protection Rules 2001, SI 2001/824, r 45. Clerical mistakes and errors in orders arising from accidental slips or omissions may be corrected by the court; the amendment must be indorsed on the order: see rr 52, 53.

4 Ie under ibid r 8 (as amended): see PARA 727 ante.

5 See ibid r 46 (amended by SI 2002/833). Such orders must not be entered until the expiration of ten clear days after the patient has been notified in accordance with r 24(1) (as substituted) (see PARA 726 ante) unless such notification is dispensed with, but this must not prevent the entry of an interim order for the protection of a patient's property or for the application of a patient's property for his benefit: Court of Protection Rules 2001, SI 2001/824, r 46. See PARA 704 ante.

6 Ibid r 47. As to the Central Office of the Supreme Court see COURTS vol 10 (Reissue) PARA 641.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(4) PROCEDURE/736. Supply of copies of documents.

736. Supply of copies of documents.

The following provisions have effect until a day to be appointed¹. Unless the Court of Protection² otherwise directs, any person who has filed an affidavit or other document is entitled, on request, to be supplied with a copy of it³. The person having the conduct of any proceedings is, unless the court otherwise directs, entitled, on request, to be supplied by the court with a copy of any order, certificate, authority, direction or other document made, given or prepared by the court in the proceedings⁴.

Any other person may, on request, be supplied with a copy of any such document as is mentioned above, if the court is satisfied that he has good reason for requiring it and that it is not reasonably practicable for him to obtain it from the person entitled to bespeak a copy from the court⁵.

Any copy of any document so supplied⁶ must, if so required, be marked as an office copy⁷.

¹ The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). The Mental Health Act 1983 Pt VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

² As to the Court of Protection see PARA 676 ante.

³ Court of Protection Rules 2001, SI 2001/824, r 75(1).

⁴ Ibid r 75(2).

⁵ Ibid r 75(3).

⁶ ie under r 75(1), (2) or (3).

⁷ Ibid r 75(4).

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(4) PROCEDURE/737. Effect and proof of orders etc.

737. Effect and proof of orders etc.

The following provisions have effect until a day to be appointed¹. The enactment² by which High Court orders are conclusive in favour of purchasers applies in relation to orders made and directions and authorities given by the judge³.

Office copies of such orders, directions and authorities sealed with the official seal of the Court of Protection are admissible in all legal proceedings as evidence of the originals without further proof⁴.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 Ie the Law of Property Act 1925 s 204: see SALE OF LAND vol 42 (Reissue) PARA 133.

3 Mental Health Act 1983 s 109(1). As to the judge see PARA 674 ante.

4 Ibid s 109(2). As to the supply of office copies see PARA 736 ante.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(4) PROCEDURE/738. Contempt of court.

738. Contempt of court.

The following provisions have effect until a day to be appointed¹. The judge² may punish any act or omission which, if occurring in the High Court, would have been a contempt of court in any manner in which it could have been punished in the High Court³, except that the power of committal is reserved to the Lord Chancellor or a nominated judge⁴. An application relating to the committal of a person for contempt of court must be made to a judge⁵.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the judge see PARA 674 ante.

3 See the Mental Health Act 1983 s 104(2).

4 See *ibid* s 104(3). The master, or any other officer of the Court of Protection must certify the act or omission to the Lord Chancellor or a nominated judge, who may then inquire and take such action as he could have taken if the proceedings had been before him: see s 104(3). As from a day to be appointed, s 104(3) is amended so as to omit the references to the Lord Chancellor: see s 104(3) (prospectively amended by the Constitutional Reform Act 2005 ss 15(1), 146, Sch 4 Pt 1 paras 150, 154, Sch 18 Pt 2). At the date at which this volume states the law no such day had been appointed.

The Mental Health Act 1983 s 104 (prospectively amended and repealed) applies to proceedings under the Enduring Powers of Attorney Act 1985 s 10(1) (repealed). As to committal see CONTEMPT OF COURT vol 9(1) (Reissue) PARA 493 et seq. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

5 Court of Protection Rules 2001, SI 2001/824, r 7(4). All other applications to the court must be made in the first instance to the master: see r 7(4). The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) (see note 1 *supra*), and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post).

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

738 Contempt of court

NOTE 4--Day now appointed: SI 2006/1014.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(4) PROCEDURE/739. Court fees.

739. Court fees.

The following provisions have effect until a day to be appointed¹. Fees payable in relation to proceedings in the Court of Protection in respect of any patient² are fixed³. A commencement fee is payable on any first application for the appointment of a receiver⁴ or other originating process in respect of any patient⁵. A receivership appointment fee is payable upon the appointment of a receiver for a patient⁶. An annual administration fee is charged on the income of patients under the court's management until the termination of the proceedings⁷. An account fee is payable on the twenty-eighth day after the last day of the period in respect of which an account is to be delivered and there is provision for where the court dispenses with the passing of an account and also for an estate account fee⁸. There is also provision for an estate account fee be payable upon the approval of an estate account by the court, when the patient has an absolute interest or a life interest in a residuary estate under the terms of a will, partial intestacy or intestacy⁹. A transaction fee is payable in respect of any order made in exercise of certain specific powers conferred on the court¹⁰. In special cases¹¹, there are provisions about the increase or adjustment of the standard fee¹². Fees are also payable in respect of receivership on appointment of an officer of the court¹³ as receiver¹⁴, on the completion of an Inland Revenue return on behalf of the patient and in the form of a receivership administration fee by such officer while he is receiver¹⁵, and in respect of the taxation of bills of costs¹⁶. A winding up fee is payable on the death of a patient and on every subsequent anniversary of that date until the court passes the final account of the receiver or directs that the final account may be dispensed with¹⁷.

Provision is also made for the remission and postponement of fees in cases of hardship or other exceptional circumstances¹⁸.

1 The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). The Mental Health Act 1983 Pt VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 Ie in the events set out in the Court of Protection Rules 2001, SI 2001/824, rr 76-83 (as amended). As to the meaning of 'patient' for these purposes see PARA 681 note 7 ante.

3 See *ibid* r 76, Appendix (amended by SI 2002/833; SI 2004/1291). As the Court of Protection see PARA 676 ante.

4 Ie made under the Court of Protection Rules 2001, SI 2001/824, r 7.

5 See *ibid* r 77, Appendix para 1 (amended by SI 2002/833; SI 2004/1291).

6 See the Court of Protection Rules 2001, SI 2001/824, r 77A, Appendix para 1A (both added by SI 2002/833; and the Court of Protection Rules 2001, SI 2001/824, Appendix para 1A amended by SI 2004/1291).

7 See the Court of Protection Rules 2001, SI 2001/824, r 78, Appendix para 2 (amended by SI 2002/833; SI 2004/1291; SI 2005/667).

8 See the Court of Protection Rules 2001, SI 2001/824, r 78A, Appendix para 2A (added by SI 2004/1291). As to delivery of accounts and dispensing with the passing of an account see the Court of Protection Rules 2001, SI 2001/824, rr 61(1), (4), 65(2), (3); and PARA 713 ante.

9 See *ibid* r 78B, Appendix para 2B (added by SI 2005/667).

10 See the Court of Protection Rules 2001, SI 2001/824, r 79, Appendix para 3 (amended by SI 2002/833; SI 2004/1291; SI 2005/667). Except where the court otherwise directs, no fee is payable upon the sale or purchase of personal chattels or any investment for the time being authorised by law for the investment of trust property or in securities quoted on any stock exchange in the United Kingdom: Court of Protection Rules 2001, SI 2001/824, r 79(7). For the meaning of 'United Kingdom' see PARA 406 note 18 ante.

11 'Special case' means an order by the court under the Mental Health Act 1983 s 96(1)(d) or (h) (see PARAS 683, 692, 694 ante) or under the Variation of Trusts Act 1958 s 1(3) (as amended; prospectively amended) (see PARA 722 ante): Court of Protection Rules 2001, SI 2001/824, r 79(8)(a) (amended by SI 2002/833).

12 See the Court of Protection Rules 2001, SI 2001/824, r 79(3)-(4A) (r 79(3) amended, r 79(4) substituted, and r 79(3A), (3B), (4A) added, by SI 2005/667).

13 Is the principal of the management division of the Court of Protection.

14 See the Court of Protection Rules 2001, SI 2001/824, r 80A(1), Appendix para 4A (both added by SI 2004/1291). Where proceedings are terminated within four weeks after the appointment such fee ceases to be payable and is refundable: see the Court of Protection Rules 2001, SI 2001/824, r 80A(2) (as so added).

15 See *ibid* r 80A(3)-(5), Appendix paras 4B-4C (all added by SI 2004/1291).

16 See the Court of Protection Rules 2001, SI 2001/824, r 80, Appendix para 4 (substituted by SI 2004/1291).

17 See the Court of Protection Rules 2001, SI 2001/824, r 82, Appendix para 7 (substituted by SI 2005/667).

18 See the Court of Protection Rules 2001, SI 2001/824, r 83(1), (2).

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(4) PROCEDURE/740. Rules as to costs.

740. Rules as to costs.

The following provisions have effect until a day to be appointed¹. All costs² incurred in relation to proceedings³ and not provided by way of remuneration⁴ are in the discretion of the Court of Protection⁵, which may order or direct them to be paid by the patient⁶ or charged on or paid out of his estate or paid by any other person attending or taking part in the proceedings⁷. Every such order or direction is enforceable in the same manner as an order as to costs made in the High Court⁸. An order or direction that costs incurred during a patient's lifetime be paid out of or charged on his estate may be made within six years after his death⁹.

Subject to the provisions of the rules of the Court of Protection¹⁰, the rules relating to costs in the Supreme Court¹¹ apply, with such modifications as may be necessary, to costs incurred in relation to proceedings to the Court of Protection as they apply to costs incurred in relation to proceedings in the High Court, and, where any costs in the Court of Protection are ordered to be assessed by way of detailed assessment, the detailed assessment proceedings are to take place in the High Court¹².

1 The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). The Mental Health Act 1983 Pt VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to fixed costs for certain categories of work in the Court of Protection see *Practice Direction* (1987) 131 Sol Jo 1246. As to the level of fixed costs recoverable by solicitors representing parties in Court of Protection proceedings see *Practice Note* (2001) 151 NLJ 21.

3 I.e. proceedings under the Court of Protection Rules 2001, SI 2001/824 (as amended): see PARA 677 ante.

4 As to remuneration of the receiver see *ibid* r 43 (as amended); and PARA 708 ante.

5 As to the Court of Protection see PARA 676 ante.

6 For the meaning of 'patient' see PARA 681 ante.

7 Court of Protection Rules 2001, SI 2001/824, r 84(1) (amended by SI 2004/1291). As to parties and persons entitled to attend see PARA 728 ante. Any costs incurred by the Official Solicitor in relation to proceedings or in carrying out any directions given by the court and not provided by remuneration under the Court of Protection Rules 2001, SI 2001/824, r 43 (as amended) (see PARA 708 ante) are to be paid by such person on or out of such funds as the court directs: r 88. As to the Official Solicitor see PARA 748 post.

8 *Ibid* r 84(2). The court has complete discretion to award costs in accordance with what may appear right: *Re Cathcart* [1892] 1 Ch 549; *affd* [1893] 1 Ch 466, CA. As to appeals see PARA 742 post.

9 Court of Protection Rules 2001, SI 2001/824, r 84(3).

10 I.e. the Court of Protection Rules 2001, SI 2001/824 (as amended).

11 I.e. CPR Pts 43-48: see CIVIL PROCEDURE.

12 See the Court of Protection Rules 2001, SI 2001/824, r 86 (amended by SI 2002/833). Unless authorised by the court, no receiver for a patient, other than the Official Solicitor, is entitled at the expense of the patient's estate to employ a solicitor or other professional person to do any work not usually requiring professional assistance: Court of Protection Rules 2001, SI 2001/824, r 87(1). For cases where an officer of the court is appointed as receiver see r 80A (as added); and PARA 739 ante. Where, in proceedings relating to a patient, a

claim is made against his estate in respect of any costs alleged to have been incurred by him or on his behalf otherwise than in relation to the proceedings, the court may refer the claim to a costs judge of the Supreme Court so that the amount due to the claimant may be ascertained by him or under his direction: r 89. The court may make an order charging the costs of an application under the Trustee Act 1925 s 36(9) (as amended; prospectively amended) (see PARA 718 ante) on the trust estate: see the Court of Protection Rules 2001, SI 2001/824, r 85, applying the Trustee Act 1925 s 60 (see TRUSTS vol 48 (2007 Reissue) PARA 853). See also PARA 720 ante. As to the basis of taxation of costs see *Re CEFD* [1963] 1 All ER 685, [1963] 1 WLR 329, Ct of Protection.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(4) PROCEDURE/741. Determination of the order to be made as to costs.

741. Determination of the order to be made as to costs.

In determining what order as to costs should be made the points to be considered are: (1) the reasons for believing a person to be suffering from mental disorder¹; (2) the reasons for believing him to be not only mentally disordered but also incapable of managing and administering his property and affairs²; (3) the reasons for instituting any proceedings assuming him to be mentally disordered and incapable of managing and administering his property and affairs; and (4) the relation in which the applicant stands to the person alleged to be mentally disordered and the objects and conduct of the applicant³.

The theory upon which proceedings are taken is that they are for the benefit and protection of persons who are believed to be incapable, by reason of mental disorder, of protecting their property or managing their affairs. Therefore, the principle applicable to a litigant who has failed in his litigation is not even *prima facie* applicable to an applicant who asks for the protection of the law in favour of one requiring the law's protection; and if the application is really prompted by a desire to protect the property of the person alleged to be incapacitated by mental disorder, and is presented on reasonable grounds and in a reasonable manner, the expense of such a proceeding ought not to fall on the person so invoking the aid of the law⁴.

1 For the meaning of 'mental disorder' see PARA 402 ante.

2 Such incapacity is the basis of the jurisdiction of the judge, except in cases of emergency: see the Mental Health Act 1983 ss 94(2), 98; and PARAS 681, 684 ante. The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

3 *Re Cathcart* [1892] 1 Ch 549 at 559-561; on appeal [1893] 1 Ch 466 at 472, CA (where the Court of Appeal disapproved the suggestion made in the court below that the respective means of the parties should also be taken into consideration). As to the level of fixed costs recoverable by solicitors representing parties in Court of Protection proceedings see *Practice Note* 151 NLJ 21.

4 *Re Cathcart* [1893] 1 Ch 466 at 471-472, CA, per Lord Halsbury; and see also *Re --* (1889) 5 TLR 227.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(4) PROCEDURE/742. Reviews and appeals.

742. Reviews and appeals.

The following provisions have effect until a day to be appointed¹. Subject to certain restrictions², an appeal may be made to a nominated judge³ by any person who is aggrieved⁴ by an order or decision of the master of the Court of Protection⁵.

Any person aggrieved by a decision of the Court of Protection⁶ that was made without an attended hearing⁷ may apply to the court within 14 days⁸ of the date on which the decision was given to have the decision reviewed by the court⁹. On considering an application for review the court may either confirm or revoke the previous decision or make any other order or decision which it thinks fit¹⁰. Any person aggrieved by any order or decision of the court made on considering an application for review may, within 14 days of the date on which the order was made or decision given, apply to the court for an attended hearing¹¹.

Any person aggrieved by a decision of the court made on an attended hearing may, within 14 days from the date of entry of the order or (as the case may be) from the date of the decision, appeal to a nominated judge¹². The applicant must within 14 days serve a notice of appeal¹³ on every person who appeared or was represented before the court when the order or decision was made or given and any other person whom the court may direct, and must lodge a copy of the notice at the court office¹⁴. The time and place at which the appeal is to be heard is fixed by the court and it must cause notice of the time and place to be sent to the appellant, who must immediately send notice of it to every person who has been served with notice of the appeal¹⁵. No further evidence may be filed in support of or in opposition to the appeal without leave of the court¹⁶.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante. The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post).

2 For restrictions on certain appeals see the Court of Protection Rules 2001, SI 2001/824, r 55.

3 As to the nominated judge see PARA 674 ante.

4 For the meaning of 'person aggrieved' see JUDICIAL REVIEW vol 61 (2010) PARA 656.

5 See the Mental Health Act 1983 s 105; and the Court of Protection Rules 2001, SI 2001/824, r 54. 'Master' for this purpose includes a nominated officer: see the Mental Health Act 1983 s 105(1); the Court of Protection Rules 2001, SI 2001/824, r 2(1); and PARA 676 note 4 ante. As to nominated officers see generally paras 674, 676 ante. The Mental Health Act 1983 s 105 applies for the purposes of the Enduring Powers of Attorney Act 1985 s 10(1)(c) (repealed).

6 As to the Court of Protection see PARA 676 ante.

7 'Attended hearing' means a hearing where one or more of the parties to the proceedings have been invited to attend the court for the determination of the application: Court of Protection Rules 2001, SI 2001/824, r 2(1).

8 As to the computation of time see PARA 729 note 2 ante.

9 Court of Protection Rules 2001, SI 2001/824, r 54(1). No review lies from any decision under r 83 (see PARA 739 ante): r 54(2).

- 10 Ibid r 54(3).
- 11 Ibid r 54(4) (amended by SI 2001/2977).
- 12 Court of Protection Rules 2001, SI 2001/824, r 55(1).
- 13 As to the form of such notice see ibid r 55, Schedule Form C.
- 14 Ibid r 55(2).
- 15 Ibid r 55(3). As to appeals to the Court of Appeal see PARA 743 post.
- 16 Ibid r 55(4).

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(4) PROCEDURE/743. Appeal from a decision of the Lord Chancellor or a nominated judge.

743. Appeal from a decision of the Lord Chancellor or a nominated judge.

The following provisions have effect until a day to be appointed¹. Appeals from any decision of the Lord Chancellor² or from any decision of a nominated judge³, whether given in exercise of his original jurisdiction or on hearing of an appeal⁴, lie to the Court of Appeal⁵, and thence to the House of Lords⁶.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the Lord Chancellor generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

3 As to the nominated judge see PARA 674 ante.

4 lie under the provisions mentioned in PARA 742 ante.

5 Mental Health Act 1983 s 105(1), (2). As from a day to be appointed, s 105(2) is amended so as to omit the reference to any decision of the Lord Chancellor: see s 105(2) (prospectively amended by the Constitutional Reform Act 2005 ss 15(1), 146, Sch 4 Pt 1 paras 150, 155, Sch 18 Pt 2). At the date at which this volume states the law no such day had been appointed. As to appeals as to costs see also PARA 740 ante. As to the Court of Appeal generally see COURTS vol 10 (Reissue) PARA 634 et seq.

6 Appellate Jurisdiction Act 1876 s 3(1). Leave of the Court of Appeal or the House of Lords is required: Administration of Justice (Appeals) Act 1934 s 1(1). See further COURTS vol 10 (Reissue) PARA 360 et seq. Section 1 is repealed by the Constitutional Reform Act 2005 ss 40(4), 146, Sch 9 Pt 1 para 3, Sch 18 Pt 5 as from a day to be appointed under s 148(1). At the date at which this volume states the law no such day or days had been appointed.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

743 Appeal from a decision of the Lord Chancellor or a nominated judge

NOTE 5--Day now appointed: SI 2006/1014.

NOTE 6--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(5) THE TERRITORIAL ELEMENT/744. Property in Scotland and Northern Ireland of English patients.

(5) THE TERRITORIAL ELEMENT

744. Property in Scotland and Northern Ireland of English patients.

The following provisions have effect until a day to be appointed¹. Where the powers under Part VII of the Mental Health Act 1983 have been exercised in relation to the property² and affairs of a patient³, or the judge's powers in case of an emergency⁴ are exercisable and have been exercised in relation to a person in England⁵ and Wales⁶, Part VII will apply equally to his property and affairs in Scotland or Northern Ireland, unless a judicial factor has been appointed for him in Scotland, or a committee, receiver or guardian has been appointed for him in Northern Ireland⁷.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 For these purposes, references to property do not include references to land or interests in land, but this does not prevent the receipt of rent, or other income, arising from them: Mental Health Act 1983 s 110(4). Section 110 (as amended) extends to Scotland: see s 146 (prospectively amended); and PARA 405 ante. As to the general meaning of 'property' for the purposes of Pt VII (as amended; prospectively amended and repealed) see PARA 681 note 5 ante.

3 For the meaning of 'patient' see PARA 681 ante.

4 In the emergency process under the Mental Health Act 1983 s 98: see PARA 684 ante.

5 For the meaning of 'England' see PARA 405 note 6 ante.

6 For the meaning of 'Wales' see PARA 405 note 7 ante.

7 See the Mental Health Act 1983 s 110 (amended by the Adults with Incapacity (Scotland) Act 2000 s 88(3), Sch 6; and the Mental Health (Northern Ireland Consequential Amendments) Order 1986, SI 1986/596, art 2). As to application of the Mental Health Act 1983 to Scotland and Northern Ireland see ss 146, 147 (prospectively amended); and PARA 405 post. Nothing in s 110 (as amended; prospectively repealed) affects any power to execute a will under s 96(1)(e) (or the Mental Health (Northern Ireland) Order 1986, SI 1986/595 (NI 4), art 99(1)(e)) or the effect of any will executed in the exercise of such a power: Mental Health Act 1983 s 110(3) (as so amended). As to Northern Ireland provisions see the Mental Health (Northern Ireland) Order 1986, SI 1986/595 (NI 4), Pt VIII (arts 97-109) (as amended).

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(5) THE TERRITORIAL ELEMENT/745. Property in England of Scottish and Northern Irish patients.

745. Property in England of Scottish and Northern Irish patients.

The following provisions have effect until a day to be appointed¹. Where, under the law in force in Scotland, a judicial factor, or, in Northern Ireland, a committee, receiver or guardian, has been appointed for any person suffering from mental disorder, the provisions of that law apply to that person's property² and affairs in England³ and Wales⁴, unless he is a patient in relation to whom powers under Part VII of the Mental Health Act 1983 have been exercised, or a person in relation to whom the judge's powers in case of an emergency⁵ are exercisable and have been exercised⁶.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 For the meaning of 'property' see PARA 744 note 2 ante.

3 For the meaning of 'England' see PARA 405 note 6 ante.

4 For the meaning of 'Wales' see PARA 405 note 7 ante.

5 Ie the emergency powers under the Mental Health Act 1983 s 98: see PARA 684 ante.

6 See *ibid* s 110(2) (amended by the Adults with Incapacity (Scotland) Act 2000 s 88(3), Sch 6; and the Mental Health (Northern Ireland Consequential Amendments) Order 1986, SI 1986/596, art 2(18)); the Mental Health Act 1983 s 110(2A) (added by the Mental Health (Northern Ireland Consequential Amendments) Order 1986, SI 1986/596, art 2(19)); and PARA 744 note 7 ante. This provision extends to Scotland: see s 146 (prospectively amended); and PARA 405 ante. As to the application of the Mental Health Act 1983 to Scotland and Northern Ireland see s 147 (prospectively amended); and PARA 405 ante.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(6) PRESERVATION OF OTHERS' INTERESTS/746. Provision for preservation of interests.

(6) PRESERVATION OF OTHERS' INTERESTS

746. Provision for preservation of interests.

The following provisions have effect until a day to be appointed¹. Where: (1) any property² of a person has been disposed of under Part VII of the Mental Health Act 1983 by sale, exchange, charging or other dealing³ (otherwise than by will) with property other than money, the removal of property from one place to another, the application of money in acquiring property or the transfer of money from one account to another; and (2) under his will⁴ or intestacy⁵, or by any gift perfected or nomination⁶ taking effect on his death, any other person would have taken an interest in his property but for the disposal, that other person takes the like interest, if and so far as the circumstances allow⁷, in any property belonging to the estate of the deceased which represents the property disposed of; and if the property disposed of was real property any property representing it must, so long as it remains part of his estate, be treated as if it were real property⁸. A sale of the patient's property by a mortgagee under his power of sale does, however, effect conversion as regards surplus proceeds⁹.

However, where the judge¹⁰ has made an order charging a patient's property with the cost of permanent improvements¹¹, he may also, by order, provide for the exclusion or restriction of the preservation of the interests of other persons in the patient's property¹².

Where the judge orders, directs or authorises any disposal of property which otherwise would result in the conversion of personal property into real property¹³, he may direct that the property so acquired be treated as personal property, so long as it remains the patient's property or forms part of his estate¹⁴.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 As to the meaning of 'property' see PARA 681 note 5 ante.

3 See *Re Stillwell, Stillwell v Stillwell* [1936] Ch 637, [1936] 1 All ER 757 (surrender of savings certificates; person nominated by patient to receive payment of certificates on patient's death was entitled to sum received on surrender).

4 As to the meaning of 'will' see PARA 683 note 10 ante.

5 The old rules of intestate succession still apply where a patient has remained mentally disordered from 1925 until his death: see *Re Harding, Westminster Bank Ltd v Laver* [1934] Ch 271; para 610 ante; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 633.

6 For an instance of a nomination see note 3 supra.

7 See *Re Hodgson's Trusts, Public Trustee v Milne* [1919] 2 Ch 189, where there was a sale of the patient's property and a partial application of the proceeds on his behalf under a misapprehension that no other funds were available and it was held that specific legatees of the property under the patient's use had no claim in respect of sums applied. This was a decision under the Lunacy Act 1890 s 123(1) (repealed), under which the operation of the provisions for the preservation of interests was expressly limited to money which had not been applied.

8 Mental Health Act 1983 s 101(1), (3). For facilitating the operation of this provision, the judge may give such directions as he thinks fit or expedient, including the carrying of money to a separate account and the transfer of property other than money: s 101(4).

9 *Re Grange, Chadwick v Grange* [1907] 2 Ch 20, CA, where the trust of the surplus proceeds was for the mortgagee, 'his heirs or assigns'. Similarly, on a sale in a partition action there was an equity for reconversion: *Re Barker* (1881) 17 ChD 241, CA.

10 As to the judge see PARA 674 ante.

11 See the Mental Health Act 1983 s 101(5); and PARA 691 ante.

12 Ibid s 101(5).

13 Eg by the purchase of a freehold house out of surplus cash. As regards the doctrine of conversion generally and its partial abolition see EQUITY vol 16(2) (Reissue) PARA 701 et seq.

14 Mental Health Act 1983 s 101(2).

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(7) LORD CHANCELLOR'S VISITORS, THE OFFICIAL SOLICITOR AND THE PUBLIC TRUSTEE/747. Lord Chancellor's Visitors.

(7) LORD CHANCELLOR'S VISITORS, THE OFFICIAL SOLICITOR AND THE PUBLIC TRUSTEE

747. Lord Chancellor's Visitors.

The following provisions have effect until a day to be appointed¹. The Lord Chancellor's Visitors are appointed by the Lord Chancellor². There are three panels of Lord Chancellor's Visitors from which persons are selected to make visits: a panel of medical visitors³, one of legal visitors⁴ and one of general visitors⁵.

The duty of the visitors is to visit⁶ patients⁷ in accordance with the prescribed directions⁸ for the purpose of investigating any particular matter or matters relating to the capacity of any patient to manage and administer his property and affairs, or otherwise relating to the exercise of the functions of the judge⁹ in relation to the patient under Part VII of the Mental Health Act 1983¹⁰.

Patients are visited in such circumstances and in such manner as may be prescribed by directions of a standing nature given by the master of the Court of Protection with the concurrence of the Lord Chancellor¹¹. Where it appears to the judge in the case of any patient that a visit is necessary for the purpose of investigating any particular matter or matters relating to the patient's capacity to manage and administer his property and affairs or otherwise relating to the exercise in relation to him of the functions of the judge under Part VII of the Mental Health Act 1983, the judge may order a visit¹². Such a visit is normally made by a general visitor unless, in a case where it appears to the judge to be essential in the circumstances for the visit to be made by a visitor with legal or medical qualifications, the judge directs that the visit be made by a medical or legal visitor¹³. A visitor must make such a report on the visit as the judge may direct¹⁴.

The master of the Court of Protection may also visit patients for these purposes¹⁵.

A medical visitor may be requested to report on a patient's testamentary capacity. When an application is made for leave to present a petition in the name of or on behalf of a patient in a matrimonial cause the judge will require a report of a medical visitor as to the patient's condition, prospects of recovery and capacity to appreciate the nature and effect of the proceedings¹⁶.

A visitor or the master may interview the patient in private¹⁷, and a medical visitor may carry out in private a medical examination and may require the production of, and inspect, any medical records relating to the patient¹⁸.

A visitor's report and information in such a report must not be disclosed except to the judge and any person authorised by the judge¹⁹. If any person discloses any such report or information in contravention of this prohibition²⁰, he is guilty of an offence²¹. Where a visitor's²² report or information contained in such a report has been disclosed with the authority of the judge²³, the court may, on the application of any person who appears to the court to be interested, give leave for written questions relevant to the issues before the court to be put to the visitor by whom the report was made²⁴. The questions sought to be put to the visitor must be submitted to the court, which may put them to the visitor with such amendments, if any, as it thinks fit, and the visitor must give his replies in writing to such questions²⁵. The court may disclose the replies given by the visitor under this provision to any person who appears to the

court to be interested, or to his legal or medical adviser, on such conditions, if any, as it thinks fit²⁶.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post; in particular as to Court of Protection Visitors see PARA 764 post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

2 Mental Health Act 1983 s 102(2). Provision is made for remuneration and allowances to be paid to visitors: s 102(4). As to the Court of Protection Visitors under the Mental Capacity Act 2005 which replace the Lord Chancellor's Visitors see PARA 764 post.

As to pensions and superannuation of visitors see the Judicial Pensions Act 1981 s 14, Sch 1 (as amended; prospectively amended); and COURTS vol 10 (Reissue) PARA 559 et seq. As to the Lord Chancellor generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

3 Mental Health Act 1983 s 102(1)(a). A person is not qualified to be appointed to the panel of medical visitors unless he is a registered medical practitioner who appears to the Lord Chancellor to have special knowledge and experience of cases of mental disorder: s 102(3)(a). For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante. For the meaning of 'mental disorder' see PARA 402 ante.

4 Ibid s 102(1)(b). A person is not qualified to be appointed to the panel of legal visitors unless he has a ten year general qualification within the meaning of the Courts and Legal Services Act 1990 s 71 (as amended) (see COURTS vol 10 (Reissue) PARA 530): Mental Health Act 1983 s 102(3)(b) (amended by the Courts and Legal Services Act 1990 s 71(2), Sch 10 para 51).

5 Mental Health Act 1983 s 102(1)(c). General visitors are not required to possess either a medical or a legal qualification for appointment: s 102(1)(c).

6 As to penalties for obstruction see ibid s 129 (as amended; prospectively amended); and PARA 772 post.

7 As to persons as to whom the judge, after considering medical evidence, is satisfied that they are incapable, by reason of mental disorder, of managing and administering their property and affairs (see ibid ss 94(2), 112; and PARA 681 note 7 ante), and persons alleged to be so incapable (see s 103(10)). Evidence must be given to satisfy the judge of that person's incapacity unless he is already subject to the jurisdiction of the Court of Protection: see *Re S(FG) (Mental Health Patient)* [1973] 1 All ER 273, [1973] 1 WLR 178, Ct of Protection.

8 Mental Health Act 1983 s 103(1). See the text and note 11 infra.

9 As to these functions see PARA 682 et seq ante. As to the judge see PARA 674 ante.

10 Mental Health Act 1983 s 103(1), (2). As to visits and reports by medical visitors where the court has reason to believe that a receiver should be appointed or other power exercised see the Court of Protection Rules 2001, SI 2001/824, r 67; and PARA 705 ante. The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) (see note 1 supra), and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post).

11 Mental Health Act 1983 s 103(1).

12 Ibid s 103(2).

13 Ibid s 103(3).

14 Ibid s 103(4).

15 Ibid s 103(7); and see the text and note 17 infra.

16 See *Re LEB* (1940) unreported, per Goddard LJ; and PARA 703 note 8 ante. See also *Re W(EEM)* [1971] Ch 123, [1970] 2 All ER 502, Ct of Protection.

17 Mental Health Act 1983 s 103(5), (7).

18 Ibid s 103(6).

19 Ibid s 103(8). For the principles see PARA 678 ante. See in particular *Re WLW* [1972] Ch 456, [1972] 2 All ER 433, Ct of Protection, where the court applied the rules of natural justice and allowed the medical visitor to attend court and be questioned on his report by the patient.

20 Ie the prohibition in the Mental Health Act 1983 s 103(8).

21 Ibid s 103(9). A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 3 on the standard scale or both: see s 103(9). 'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37 (as amended): see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Criminal Justice Act 2003 s 164; and MAGISTRATES vol 29(2) (Reissue) PARA 807.

As from a day to be appointed, the Mental Health Act 1983 s 103(9) is amended so as to omit the references to imprisonment: see s 103(9) (prospectively amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 9). At the date at which this volume states the law no such day had been appointed.

Publication without leave is also contempt of court: see PARA 738 ante.

22 For these purposes, 'visitor' means a medical or legal visitor (see notes 3-4 supra): Court of Protection Rules 2001, SI 2001/824, r 29(5). See note 10 supra.

23 Ie in pursuance of the Mental Health Act 1983 s 103(8).

24 Court of Protection Rules 2001, SI 2001/824, r 29(1).

25 Ibid r 29(2) (amended by SI 2002/833).

26 Court of Protection Rules 2001, SI 2001/824, r 29(3).

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(7) LORD CHANCELLOR'S VISITORS, THE OFFICIAL SOLICITOR AND THE PUBLIC TRUSTEE/748. The role of the Official Solicitor, the Public Trustee and the Public Guardianship Office.

748. The role of the Official Solicitor, the Public Trustee and the Public Guardianship Office.

In 2001 the Public Trustee Office ceased to exist, and its functions were transferred to various organisations. In particular, mental health functions became the responsibility of the Public Guardianship Office, which is the administrative arm of the Court of Protection¹, and trust work was relocated into the Official Solicitor's Office. However, the office of Public Trustee continues to exist; and the Official Solicitor and the Public Trustee continue to have separate functions, although in practice one person may be appointed to hold both offices². Legislation requires certain work to be undertaken by the Public Trustee, whilst other work must be undertaken by the Official Solicitor.

Until a day to be appointed³, where in the opinion of the Court of Protection an application ought to be made for the appointment or discharge of a receiver⁴ or for the exercise of any other power conferred on the court with respect to the property and affairs of a patient, and there appears to the court to be no other suitable person able and willing to make the application, or the court for any other reason thinks fit, the court may direct that the application be made by an officer of the court or, if he consents, the Official Solicitor⁵. Where in any proceedings the court considers that the interests of a patient for whom a receiver has been appointed are not adequately represented the court may, with his consent, direct that the Official Solicitor act as solicitor for the patient⁶ either generally in the proceedings or for any particular purpose connected with the proceedings⁷.

The court may direct the Official Solicitor to take out any summons and conduct any proceedings and carry out any specified directions, and may, if it thinks fit, appoint the Official Solicitor to act as solicitor for the patient in the proceedings in the place of any solicitor previously acting⁸. The court may allow or direct any person to take out a witness summons requiring the person named in it to attend before the court and give oral evidence or produce any document⁹.

In addition to his powers and duties under the Public Trustee Act 1906, the Public Trustee¹⁰ may, in such cases or circumstances as may be prescribed by rules¹¹ or by directions of the master of the Court of Protection¹², exercise the functions of the judge¹³ under Part VII of the Mental Health Act 1983¹⁴.

The Public Trustee may act, as well as appoint a person to act, as receiver under the Mental Health Act 1983¹⁵. In normal circumstances the Public Trustee will refer to the Court of Protection any applications made in connection with the execution of a will, the conduct of legal proceedings in the name of the patient or on his behalf, the exercise of any power vested in the patient¹⁶, substantial gifts¹⁷, applications in cases of emergency¹⁸, the appointment of a receiver¹⁹, the vesting of stock in a curator appointed outside England and Wales²⁰, or with respect to the general powers of the judge²¹.

1 As to the Court of Protection see PARA 676 ante.

2 See further COURTS vol 10 (Reissue) PARA 667; TRUSTS vol 48 (2007 Reissue) PARA 766.

3 The Court of Protection Rules 2001, SI 2001/824 (as amended) are made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) and will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). The Mental Health Act 1983 Pt VII (as amended; prospectively

amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to the new provisions in the Mental Capacity Act 2005 see PARA 749 et seq post. As to the Mental Capacity Act 2005 generally see also PARA 406 ante.

4 As to the power to appoint and discharge receivers see PARAS 704, 714 ante.

5 Court of Protection Rules 2001, SI 2001/824, r 11; and see PARAS 705, 728 ante. As to the powers and duties of the Official Solicitor generally see the Supreme Court Act 1981 s 90 (as amended; prospectively amended); and COURTS vol 10 (Reissue) PARA 667. As to the role of the Official Solicitor in relation to adults under disability in family proceedings see *Practice Note* [2001] 2 FCR 566. As to the role of the Official Solicitor in relation to adults under disability in declaratory proceedings concerning medical and welfare decisions see *Practice Note* [2001] 2 FCR 569; and *Practice Direction* [2002] 1 All ER 794.

6 As to the meaning of 'patient' in the Court of Protection Rules 2001, SI 2001/824 (as amended) see PARA 681 note 7 ante.

7 Ibid r 13. It is not necessary to appoint the Official Solicitor to be receiver or litigation friend for the patient: r 13. As to the costs of the Official Solicitor see PARA 740 note 7 ante.

8 Ibid r 49(2). See PARA 734 note 3 ante.

9 Ibid r 48(1). As to the form of such witness summons see Schedule Form B. As to the attendance of witnesses and examination of parties see PARA 732 ante.

10 However, note the merger of the trust division of the Public Trust Office with the Official Solicitor's Office: see the text and notes 1-2 supra.

11 The rules made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed). See the Court of Protection Rules 2001, SI 2001/824 (as amended); and PARA 677 ante.

12 Mental Health Act 1983 s 94(1)(aa) (added by the Public Trustee and Administration of Funds Act 1986 s 2(1), (2)(b)). See PARA 674 note 15 ante.

13 As to the judge see PARA 674 ante.

14 Mental Health Act 1983 s 94(1), (1A) (s 94(1) amended, and s 94(1A) added, by the Public Trustee and Administration of Funds Act 1986 s 2(2)(a), (c)). See PARAS 674-675 ante. This amended provision enables the Public Trustee to carry out for the Court of Protection functions given to the court under enactments other than the Mental Health Act 1983, eg registration work given to the court under the Enduring Powers of Attorney Act 1985 (repealed) (see AGENCY vol 1 (2008) PARA 194 et seq).

15 Public Trustee and Administration of Funds Act 1986 s 3(2). As from a day to be appointed, a new provision is substituted in place of s 3(1)-(5) stating that the Public Trustee may exercise the functions of a deputy appointed by the Court of Protection (see PARA 760 post): see s 3 (prospectively amended by the Mental Capacity Act 2005 s 67(1), Sch 6 para 33(a)). At the date at which this volume states the law no such day had been appointed.

As to the fees payable to the Public Trustee as receiver see the Court of Protection Rules 2001, SI 2001/824, r 80A (as added); and PARA 739 ante.

16 See the Mental Health Act 1983 s 96(1)(e), (i), (k); and PARAS 683, 695, 701, 703 ante.

17 See ibid s 96(1)(d); and PARA 694 ante.

18 See ibid s 98; and PARA 684 ante.

19 See ibid s 99; and PARA 704 ante.

20 See ibid s 100; and PARA 725 ante.

21 See ibid s 104; and *Practice Direction* [1987] 1 All ER 403, [1987] 1 WLR 63.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

748 The role of the Official Solicitor, the Public Trustee and the Public Guardianship Office

NOTES 3, 15--Day now appointed: SI 2007/1897.

NOTE 5--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Practice Note [2001] 2 FCR 569 superseded by *Practice Note (Official Solicitor: Declaratory Proceedings: Medical and Welfare Decisions for Adults who Lack Capacity)* [2006] 2 FLR 373.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(8) THE COURT OF PROTECTION AND THE PUBLIC GUARDIAN UNDER THE MENTAL CAPACITY ACT 2005/(i) In general/749. Introduction.

(8) THE COURT OF PROTECTION AND THE PUBLIC GUARDIAN UNDER THE

(i) In general

749. Introduction.

As from a day to be appointed¹, the provisions of Part 2 the Mental Capacity Act 2005² on the management of patients' property and affairs replace those contained in Part VII of the Mental Health Act 1983³. The replacement provisions deal with a new superior court of record (the Court of Protection), its judges and procedures⁴; establish a new statutory official (the Public Guardian) to support the work of the court⁵; and also provide for Court of Protection Visitors⁶. This new Court of Protection will have an expanded jurisdiction to cover decisions relating to the personal welfare of incapacitated adults in addition to their property and affairs⁷. Decisions relating to personal welfare and property and affairs will also be able to be taken by the donee of a lasting power of attorney⁸ who will be subject to the supervision of the Public Guardian⁹.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 *Ie* *ibid* Pt 2 (ss 45-61).

3 *Ie* the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended) (see PARA 671 et seq ante). Part VII (as amended; prospectively amended) is repealed by the Mental Capacity Act 2005 s 67(2), Sch 7 as from a day or days to be appointed. At the date at which this volume states the law no such day or days had been appointed. As to transitional provisions see PARA 406 note 67 ante.

The Court of Protection Rules 2001, SI 2001/824 (as amended) (see PARA 677 ante) which are made under the Mental Health Act 1983 Pt VII (as amended; prospectively amended and repealed) will be replaced by new rules under the Mental Capacity Act 2005 s 51 (see PARAS 750, 752 post). See also note 1 supra.

4 See PARA 750 et seq post.

5 See PARA 761 et seq post.

6 See PARA 764 post.

7 See PARAS 759-760 post.

8 See PARAS 647-651 ante.

9 See note 5 supra. As to the court's power in relation to lasting powers of attorney see PARA 651 ante.

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(8) THE COURT OF PROTECTION AND THE PUBLIC GUARDIAN UNDER THE MENTAL CAPACITY ACT 2005/ (ii) The Court of Protection/750. The Court of Protection.

(ii) The Court of Protection

750. The Court of Protection.

As from a day to be appointed¹, there is to be a superior court of record known as the Court of Protection². The court is to have an official seal³, and a central office and registry at a place appointed by the Lord Chancellor⁴.

The court may sit at any place in England⁵ and Wales⁶, on any day and at any time⁷. The Lord Chancellor may designate as additional registries of the court any district registry of the High Court and any county court office⁸.

Subject to Court of Protection Rules⁹, the jurisdiction of the court is exercisable by a judge nominated for that purpose by the Lord Chancellor, or a person acting on the Lord Chancellor's behalf¹⁰. To be nominated, a judge must be: (1) the President of the Family Division¹¹; (2) the Vice-Chancellor¹²; (3) a puisne judge of the High Court¹³; (4) a circuit judge¹⁴; or (5) a district judge¹⁵.

The Lord Chancellor must: (a) appoint one of the judges nominated by virtue of heads (1) to (3) above to be President of the Court of Protection¹⁶; and (b) appoint another of those judges to be Vice-President of the Court of Protection¹⁷. The Lord Chancellor must appoint one of the judges nominated by virtue of head (4) or head (5) above to be Senior Judge of the Court of Protection, having such administrative functions in relation to the court as the Lord Chancellor may direct¹⁸.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 Ibid s 45(1). As to the Court of Protection under the Mental Health Act 1983 see PARA 676 ante. This previous Court of Protection (which was in fact an office of the Supreme Court) will cease to exist with the coming into force of the Mental Capacity Act 2005: see s 45(6). As to the Supreme Court generally see COURTS vol 10 (Reissue) PARA 601 et seq.

3 Ibid s 45(2).

4 Ibid s 45(3). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

5 For the meaning of 'England' see PARA 405 note 6 ante.

6 For the meaning of 'Wales' see PARA 405 note 7 ante.

7 Mental Capacity Act 2005 s 45(4).

8 Ibid s 45(5). As to the High Court generally see COURTS vol 10 (Reissue) PARA 351 et seq. As to county courts generally see COURTS vol 10 (Reissue) PARA 701 et seq.

9 *Ie* under *ibid* s 51(2)(d) (see PARA 753 post).

10 Ibid s 46(1). As to subordinate legislation generally see PARA 406 note 68 ante.

11 Ibid s 46(2)(a). As to the President of the Family Division see COURTS vol 10 (Reissue) PARA 701.

- 12 Ibid s 46(2)(b). As to the Vice-Chancellor see COURTS vol 10 (Reissue) PARA 515.
- 13 Ibid s 46(2)(c). As to puisne judges of the High Court see COURTS vol 10 (Reissue) PARA 602.
- 14 Ibid s 46(2)(d). As to circuit judges see COURTS vol 10 (Reissue) PARA 522 et seq.
- 15 Ibid s 46(2)(e). As to district judges see COURTS vol 10 (Reissue) PARA 530.
- 16 Ibid s 46(3)(a).
- 17 Ibid s 46(3)(b).
- 18 Ibid s 46(4).

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

750 The Court of Protection

TEXT AND NOTES 7, 8--Mental Capacity Act 2005 s 45(4), (5) amended, s 45(5A) added: SI 2006/1016.

TEXT AND NOTES 10, 16-18--2005 Act s 46(1), (3), (4) amended: SI 2006/1016.

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751. Orders, directions and reports.

As from a day to be appointed¹, the Court of Protection² has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court³. Office copies of orders made, directions given or other instruments issued by the court and sealed with its official seal⁴ are admissible in all legal proceedings as evidence of the originals without any further proof⁵.

The court may, pending the determination of an application to it in relation to a person ('P'), make an order or give directions in respect of any matter if: (1) there is reason to believe that P lacks capacity⁶ in relation to the matter⁷; (2) the matter is one to which its powers under the Mental Capacity Act 2005 extend⁸; and (3) it is in P's best interests⁹ to make the order, or give the directions, without delay¹⁰.

Where, in proceedings brought in respect of a person ('P') under Part 1 of the Mental Capacity Act 2005¹¹, the court is considering a question relating to P¹², it may require a report¹³ to be made to it by the Public Guardian¹⁴ or by a Court of Protection Visitor¹⁵. The court may require a local authority¹⁶, or an NHS body¹⁷, to arrange for a report to be made: (a) by one of its officers or employees¹⁸; or (b) by such other person (other than the Public Guardian or a Court of Protection Visitor) as the authority, or the NHS body, considers appropriate¹⁹.

In complying with one of the above requirements²⁰, the Public Guardian or a Court of Protection Visitor may, at all reasonable times, examine and take copies of: (i) any health record²¹; (ii) any record of a local authority, or held by it, compiled in connection with a social services function²²; and (iii) any record held by a person registered under Part II of the Care Standards Act 2000²³, so far as the record relates to P²⁴.

If the Public Guardian or a Court of Protection Visitor is making a visit in the course of complying with a requirement²⁵, he may interview P in private²⁶. If a Court of Protection Visitor who is a Special Visitor²⁷ is making a visit in the course of complying with a requirement²⁸, he may if the court so directs carry out in private a medical, psychiatric or psychological examination of P's capacity and condition²⁹.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 As to the Court of Protection see PARA 750 ante.

3 Mental Capacity Act 2005 s 47(1). As to the High Court see COURTS vol 10 (Reissue) PARA 351 et seq. The Law of Property Act 1925 s 204 (orders of High Court conclusive in favour of purchasers: see SALE OF LAND vol 42 (Reissue) PARA 133) applies in relation to orders and directions of the court as it applies to orders of the High Court: Mental Capacity Act 2005 s 47(2).

4 As to the official seal see PARA 750 ante.

5 Mental Capacity Act 2005 s 47(3). As to proof generally see CIVIL PROCEDURE vol 11 (2009) PARA 752 et seq.

6 As to lack of capacity see PARA 641 note 3 ante.

7 Mental Capacity Act 2005 s 48(a).

8 Ibid s 48(b).

- 9 As to best interests see PARA 642 ante.
- 10 Mental Capacity Act 2005 s 48(c).
- 11 Ie ibid Pt 1 (ss 1-44) (see PARAS 641-670 ante, 756-760 post).
- 12 Ibid s 49(1).
- 13 The report must deal with such matters relating to P as the court may direct: ibid s 49(4). Court of Protection Rules may specify matters which, unless the court directs otherwise, must also be dealt with in the report: Mental Capacity Act 2005 s 49(5). The report may be made in writing or orally, as the court may direct: s 49(6). As to Court of Protection Rules see PARA 752 post.
- 14 'Public Guardian' has the meaning given in ibid s 57 (see PARA 761 post): s 64(1).
- 15 Ibid s 49(2). 'Court of Protection Visitor' has the meaning given in s 61 (see PARA 764 post): s 64(1).
- 16 For the meaning of 'local authority' see PARA 664 note 11 ante.
- 17 'NHS body' has the meaning given in the Health and Social Care (Community Health and Standards) Act 2003 s 148: Mental Capacity Act 2005 s 49(10).
- 18 Ibid s 49(3)(a).
- 19 Ibid s 49(3)(b).
- 20 Ie a requirement imposed under ibid s 49(2) or (3): see s 49(11).
- 21 Ibid s 49(7)(a). For the meaning of 'health record' see PARA 664 note 10 ante.
- 22 Ibid s 49(7)(b). For the meaning of 'social services function' see PARA 664 note 12 ante.
- 23 Ibid s 49(7)(c). The reference in the text is a reference to the Care Standards Act 2000 Pt II (ss 11-42) (as amended; prospectively amended) (see PARA 432 ante; and SOCIAL SERVICES AND COMMUNITY CARE).
- 24 Mental Capacity Act 2005 s 49(7).
- 25 See note 20 supra.
- 26 Mental Capacity Act 2005 s 49(8).
- 27 As to Special Visitors see PARA 764 post.
- 28 See note 20 supra.
- 29 Mental Capacity Act 2005 s 49(9).

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(8) THE COURT OF PROTECTION AND THE PUBLIC GUARDIAN UNDER THE MENTAL CAPACITY ACT 2005/ (ii) The Court of Protection/752. Court of Protection Rules and practice and procedure generally.

752. Court of Protection Rules and practice and procedure generally.

As from a day to be appointed¹, no permission is required for an application to the Court of Protection² for the exercise of any of its powers under the Mental Capacity Act 2005: (1) by a person who lacks, or is alleged to lack, capacity³; (2) if such a person has not reached 18, by anyone with parental responsibility⁴ for him⁵; (3) by the donor or a donee of a lasting power of attorney⁶ to which the application relates⁷; (4) by a deputy⁸ appointed by the court for a person to whom the application relates⁹; or (5) by a person named in an existing order of the court, if the application relates to the order¹⁰. However, permission is required¹¹ for any other application to the court¹², and in deciding whether to grant permission the court must, in particular, have regard to: (a) the applicant's connection with the person to whom the application relates¹³; (b) the reasons for the application¹⁴; (c) the benefit to the person to whom the application relates of a proposed order or directions¹⁵; and (d) whether the benefit can be achieved in any other way¹⁶.

The Lord Chancellor¹⁷ may make rules of court (to be called 'Court of Protection Rules') with respect to the practice and procedure of the court¹⁸. Court of Protection Rules may, in particular, make provision:

- 177 (i) as to the manner and form in which proceedings are to be commenced¹⁹;
- 178 (ii) as to the persons entitled to be notified of, and be made parties to, the proceedings²⁰;
- 179 (iii) for the allocation, in such circumstances as may be specified, of any specified description of proceedings to a specified judge or to specified descriptions of judges²¹;
- 180 (iv) for the exercise of the jurisdiction of the court, in such circumstances as may be specified, by its officers or other staff²²;
- 181 (v) for enabling the court to appoint a suitable person (who may, with his consent, be the Official Solicitor²³) to act in the name of, or on behalf of, or to represent the person to whom the proceedings relate²⁴;
- 182 (vi) for enabling an application to the court to be disposed of without a hearing²⁵;
- 183 (vii) for enabling the court to proceed with, or with any part of, a hearing in the absence of the person to whom the proceedings relate²⁶;
- 184 (viii) for enabling or requiring the proceedings or any part of them to be conducted in private and for enabling the court to determine who is to be admitted when the court sits in private and to exclude specified persons when it sits in public²⁷;
- 185 (ix) as to what may be received as evidence (whether or not admissible apart from the rules) and the manner in which it is to be presented²⁸;
- 186 (x) for the enforcement of orders made and directions given in the proceedings²⁹.

Court of Protection Rules may, instead of providing for any matter, refer to provision made or to be made about that matter by directions³⁰.

Court of Protection Rules may make different provision for different areas³¹.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 As to the Court of Protection see PARA 750 ante. As to practice and procedure under the Mental Health Act 1983 see PARA 726 et seq ante.

3 Mental Capacity Act 2005 s 50(1)(a). As to lack of capacity see PARA 641 note 3 ante.

4 'Parental responsibility' has the same meaning as in the Children Act 1989 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 134): Mental Capacity Act 2005 s 50(4).

5 Ibid s 50(1)(b).

6 For the meaning of 'lasting power of attorney' see PARA 642 note 16 ante. See PARA 647 et seq ante.

7 Mental Capacity Act 2005 s 50(1)(c).

8 For the meaning of 'deputy' see PARA 642 note 18 ante. See also PARA 757 et seq post.

9 Mental Capacity Act 2005 s 50(1)(d).

10 Ibid s 50(1)(e). See also PARA 751 ante.

11 le subject to Court of Protection Rules (see the text to note 18 infra) and to the Mental Capacity Act 2005 Sch 3 para 20(2) (declarations relating to private international law) (see PARA 408 ante).

12 Ibid s 50(2).

13 Ibid s 50(3)(a).

14 Ibid s 50(3)(b).

15 Ibid s 50(3)(c). As to orders and directions see PARA 751 ante.

16 Ibid s 50(3)(d).

17 As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

18 Mental Capacity Act 2005 s 51(1). 'Court of Protection Rules' has the meaning given in s 51(1): s 64(1). As to subordinate legislation generally see PARA 406 note 68 ante.

Court of Protection Rules under s 51 replace the Court of Protection Rules 2001, SI 2001/824 (as amended) (see PARA 677 et seq ante) made under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed) (see PARA 671 et seq ante).

19 Mental Capacity Act 2005 s 51(2)(a).

20 Ibid s 51(2)(b).

21 Ibid s 51(2)(c).

22 Ibid s 51(2)(d).

23 As to the Official Solicitor see PARA 748 ante; and COURTS vol 10 (Reissue) PARA 667.

24 Mental Capacity Act 2005 s 51(2)(e).

25 Ibid s 51(2)(f).

26 Ibid s 51(2)(g).

27 Ibid s 51(2)(h).

28 Ibid s 51(2)(i). As to evidence generally see CIVIL PROCEDURE vol 11 (2009) PARA 749 et seq.

29 Ibid s 51(2)(j). As to enforcement generally see CIVIL PROCEDURE vol 12 (2009) PARA 1223 et seq.

30 Ibid s 51(3). As to directions see PARA 751 ante.

31 Ibid s 51(4).

UPDATE

674-752 Persons by whom the jurisdiction is exercisable ... Court of Protection Rules and practice and procedure generally

SI 2001/824 replaced: Court of Protection Rules 2007, SI 2007/1744 (amended by SI 2009/582, SI 2009/3348).

752 Court of Protection Rules and practice and procedure generally

TEXT AND NOTES 1-10--No permission is required for an application to the Court of Protection under the Mental Capacity Act 2005 s 21A by the relevant person's representative: s 50(1A) (added by Mental Health Act 2007 Sch 9 para 9).

TEXT AND NOTE 18--Rules of court with respect to the practice and procedure of the court (to be called 'Court of Protection Rules') may be made in accordance with the Constitutional Reform Act 2005 Sch 1 Pt 1: Mental Capacity Act 2005 s 51(1) (substituted by SI 2006/1016).

NOTE 27--As to when the court should allow the media to attend a hearing see *Independent News and Media Ltd v A* [2009] EWHC 2858 (Fam), [2010] WTLR 55.

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753. Practice directions.

As from a day to be appointed¹, the President of the Court of Protection² may, with the concurrence of the Lord Chancellor³, give directions as to the practice and procedure of the court⁴.

Directions as to the practice and procedure of the court may not be given by anyone other than the President of the Court of Protection without the approval of the President of the Court of Protection and the Lord Chancellor⁵.

Nothing in the provisions described above prevents the President of the Court of Protection, without the concurrence of the Lord Chancellor, giving directions which contain guidance as to law or making judicial decisions⁶.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 As to the President of the Court of Protection and the Court of Protection generally see PARA 750 ante.

3 As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

4 Mental Capacity Act 2005 s 52(1). See also PARA 752 ante.

5 Ibid s 52(2).

6 Ibid s 52(3).

UPDATE

753 Practice directions

TEXT AND NOTES--Directions as to the practice and procedure of the court may be given in accordance with the Constitutional Reform Act 2005 Sch 2 Pt 1: Mental Capacity Act 2005 s 52(1) (s 52(1)-(3) substituted by SI 2006/1016). Practice directions given otherwise than under the Mental Capacity Act 2005 s 52(1) may not be given without the approval of (1) the Lord Chancellor, and (2) the Lord Chief Justice: s 52(2). The Lord Chief Justice may nominate any of the following to exercise his functions under s 52 (a) the President of the Court of Protection; (b) a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)): Mental Capacity Act 2005 s 52(3).

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754. Rights of appeal.

As from a day to be appointed¹, an appeal lies to the Court of Appeal² from any decision of the Court of Protection³.

Court of Protection Rules⁴ may provide that where a decision of the court is made by: (1) officers or other staff exercising the jurisdiction of the court by virtue of rules made for that purpose⁵; (2) by a district judge⁶; or (3) by a circuit judge⁷, an appeal from that decision lies to a prescribed higher judge of the court and not to the Court of Appeal⁸. For these purposes, the higher judges of the court are: (a) in relation to a person mentioned in head (1) above, a circuit judge or a district judge⁹; (b) in relation to a person mentioned in head (2) above, a circuit judge¹⁰; (c) in relation to any person mentioned above¹¹, one of the following nominated judges¹²: the President of the Family Division¹³, the Vice-Chancellor¹⁴, or a puisne judge of the High Court¹⁵.

Court of Protection Rules may make provision:

- 187 (i) that, in such cases as may be specified, an appeal from a decision of the court may not be made without permission¹⁶;
- 188 (ii) as to the person or persons entitled to grant permission to appeal¹⁷;
- 189 (iii) as to any requirements to be satisfied before permission is granted¹⁸;
- 190 (iv) that where a higher judge of the court makes a decision on an appeal, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that the appeal would raise an important point of principle or practice¹⁹, or there is some other compelling reason for the Court of Appeal to hear it²⁰;
- 191 (v) as to any considerations to be taken into account in relation to granting or refusing permission to appeal²¹.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 As to the Court of Appeal see COURTS vol 10 (Reissue) PARA 634 et seq.

3 Mental Capacity Act 2005 s 53(1). This is subject to the other provisions of s 53: see the text to notes 4-21 infra. As to the Court of Protection see PARA 750 ante.

4 As to Court of Protection Rules see PARA 752 ante. As to subordinate legislation generally see PARA 406 note 68 ante.

5 Mental Capacity Act 2005 s 53(2)(a). The reference in the text is a reference to rules made under s 51(2)(d): see PARA 752 head (iv) ante.

6 Ibid s 53(2)(b). As to district judges see COURTS vol 10 (Reissue) PARA 530.

7 Ibid s 53(2)(c). As to circuit judges see COURTS vol 10 (Reissue) PARA 522 et seq.

8 Ibid s 53(2).

9 Ibid s 53(3)(a).

- 10 Ibid s 53(3)(b).
- 11 Ie any person mentioned in ibid s 53(2) (see the text and notes 4-8 supra).
- 12 Ie judges nominated by virtue of ibid s 46(2)(a)-(c): see PARA 750 heads (1)-(3) ante.
- 13 As to the President of the Family Division see COURTS vol 10 (Reissue) PARA 701.
- 14 As to the Vice-Chancellor see COURTS vol 10 (Reissue) PARA 515.
- 15 Mental Capacity Act 2005 s 53(3)(c). As to puisne judges of the High Court see COURTS vol 10 (Reissue) PARA 602.
- 16 Ibid s 53(4)(a).
- 17 Ibid s 53(4)(b).
- 18 Ibid s 53(4)(c).
- 19 Ibid s 53(4)(d)(i).
- 20 Ibid s 53(4)(d)(ii).
- 21 Ibid s 53(4)(e).

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755. Fees and costs.

As from a day to be appointed¹, the Lord Chancellor² may, after consultation³ and with the consent of the Treasury⁴, by order prescribe fees payable in respect of anything dealt with by the Court of Protection⁵. Such an order may in particular contain provision as to: (1) scales or rates of fees⁶; (2) exemptions from and reductions in fees⁷; (3) remission of fees in whole or in part⁸.

The Lord Chancellor must take such steps as are reasonably practicable to bring information about fees to the attention of persons likely to have to pay them⁹. Fees payable as above¹⁰ are recoverable summarily as a civil debt¹¹.

Subject to Court of Protection Rules¹², the costs of and incidental to all proceedings in the Court of Protection are in its discretion¹³. The rules may in particular make provision for regulating matters relating to the costs of those proceedings, including prescribing scales of costs to be paid to legal or other representatives¹⁴. The court has full power to determine by whom and to what extent the costs are to be paid¹⁵.

The court may, in any proceedings, disallow, or order the legal or other representatives concerned to meet, the whole of any wasted costs¹⁶ or such part of them as may be determined in accordance with the rules¹⁷.

Court of Protection Rules may make provision: (a) as to the way in which, and funds from which, fees and costs are to be paid¹⁸; (b) for charging fees and costs upon the estate of the person to whom the proceedings relate¹⁹; (c) for the payment of fees and costs within a specified time of the death of the person to whom the proceedings relate or the conclusion of the proceedings²⁰.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

3 Before making an order under the Mental Capacity Act 2005 s 54, the Lord Chancellor must consult: (1) the President of the Court of Protection; (2) the Vice-President of the Court of Protection; and (3) the Senior Judge of the Court of Protection: s 54(3). As to the President, the Vice-President and the Senior Judge of the Court of Protection see PARA 750 ante.

4 As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.

5 Mental Capacity Act 2005 s 54(1). As to subordinate legislation generally see PARA 406 note 68 ante. As to the Court of Protection see PARA 750 ante.

6 Ibid s 54(2)(a).

7 Ibid s 54(2)(b).

8 Ibid s 54(2)(c).

9 Ibid s 54(4).

10 I.e. fees payable under ibid s 54.

- 11 Ibid s 54(5).
- 12 As to Court of Protection Rules see PARA 752 ante.
- 13 Mental Capacity Act 2005 s 55(1).
- 14 Ibid s 55(2). 'Legal or other representative', in relation to a party to proceedings, means any person exercising a right of audience or right to conduct litigation on his behalf: s 55(5).
- 15 Ibid s 55(3).
- 16 'Wasted costs' means any costs incurred by a party: (1) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or (2) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay: ibid s 55(6).
- 17 Ibid s 55(4).
- 18 Ibid s 56(1)(a).
- 19 Ibid s 56(1)(b). A charge on the estate of a person created by virtue of s 56(1)(b) does not cause any interest of the person in any property to fail or determine or to be prevented from recommencing: s 56(2).
- 20 Ibid s 56(1)(c).

UPDATE

755 Fees and costs

TEXT AND NOTES 1-8--The Court of Protection Fees Order 2007, SI 2007/1745 (amended by SI 2009/513), has been made under the 2005 Act s 54(1), (2).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(8) THE COURT OF PROTECTION AND THE PUBLIC GUARDIAN UNDER THE MENTAL CAPACITY ACT 2005/ (ii) The Court of Protection/756. Power to make declarations.

756. Power to make declarations.

As from a day to be appointed¹, the Court of Protection² may make declarations³ as to:

192 (1) whether a person has or lacks capacity⁴ to make a decision specified in the declaration⁵;

193 (2) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration⁶;

194 (3) the lawfulness or otherwise of any act⁷ done, or yet to be done, in relation to that person⁸.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 As to the Court of Protection see PARA 750 ante.

3 This jurisdiction is founded on the inherent jurisdiction of the High Court: see PARAS 553, 612 ante.

4 As to lack of capacity see PARA 641 note 3 ante.

5 Mental Capacity Act 2005 s 15(1)(a).

6 Ibid s 15(1)(b).

7 'Act' includes an omission and a course of conduct: ibid s 15(2).

8 Ibid s 15(1)(c).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(8) THE COURT OF PROTECTION AND THE PUBLIC GUARDIAN UNDER THE MENTAL CAPACITY ACT 2005/ (ii) The Court of Protection/757. Powers to make decisions and appoint deputies: general.

757. Powers to make decisions and appoint deputies: general.

As from a day to be appointed¹, if a person ('P') lacks capacity² in relation to a matter or matters concerning P's personal welfare or P's property and affairs³, the Court of Protection⁴ may: (1) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters⁵; or (2) appoint a person (a 'deputy')⁶ to make decisions on P's behalf in relation to the matter or matters⁷. These powers are subject to the provisions of the Mental Capacity Act 2005⁸.

When deciding whether it is in P's best interests to appoint a deputy, the court must have regard⁹ to the principles that: (a) a decision by the court is to be preferred to the appointment of a deputy to make a decision¹⁰; and (b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances¹¹.

The court may make such further orders or give such directions¹², and confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under heads (1) and (2) above¹³. The court may make the order, give the directions or make the appointment on such terms as it considers are in P's best interests, even though no application is before the court for an order, directions or an appointment on those terms¹⁴.

An order of the court may be varied or discharged by a subsequent order¹⁵. The court may, in particular, revoke the appointment of a deputy or vary the powers conferred on him if it is satisfied that the deputy: (i) has behaved, or is behaving, in a way that contravenes the authority conferred on him by the court or is not in P's best interests¹⁶; or (ii) proposes to behave in a way that would contravene that authority or would not be in P's best interests¹⁷.

The Lord Chancellor¹⁸ may by order make provision as to the transfer of proceedings relating to a person under 18, in such circumstances as are specified in the order: (A) from the Court of Protection to a court having jurisdiction under the Children Act 1989¹⁹; or (B) from a court having jurisdiction under that Act to the Court of Protection²⁰.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 As to lack of capacity see PARA 641 note 3 ante.

3 Mental Capacity Act 2005 s 16(1). As to the powers concerning personal welfare see PARA 758 post. As to powers concerning property and affairs see PARA 759 post.

4 As to the Court of Protection see PARA 750 ante.

5 Mental Capacity Act 2005 s 16(2)(a).

6 For the meaning of 'deputy' see PARA 642 note 18 ante.

7 Mental Capacity Act 2005 s 16(2)(b). As to the appointment of deputies see PARA 760 post.

8 Ibid s 16(3). The powers of the court are, in particular, subject to s 1 (the principles: see PARA 641 ante) and s 4 (best interests: see PARA 642 ante).

- 9 le in addition to the matters mentioned in *ibid* s 4 (see PARA 642 ante).
- 10 *Ibid* s 16(4)(a). Section 16(4) is intended to emphasise the principle of least restriction in s 1(6) (see PARA 641 head (5) ante).
- 11 *Ibid* s 16(4)(b). See note 10 *supra*.
- 12 As to orders and directions see PARA 751 ante.
- 13 Mental Capacity Act 2005 s 16(5). As to a restriction on or qualification to the power in s 16(5) see s 20(2); and PARA 760 post.
- 14 *Ibid* s 16(6). This is without prejudice to s 4 (see PARA 642 ante).
- 15 *Ibid* s 16(7). Section 16(7) is subject to Sch 2 para 6 (see PARA 759 post): s 18(5).
- 16 *Ibid* s 16(8)(a).
- 17 *Ibid* s 16(8)(b).
- 18 As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.
- 19 Mental Capacity Act 2005 s 21(a). As to courts with jurisdiction under the Children Act 1989 see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 208 et seq. This provision is to deal with the overlap, as the Mental Capacity Act 2005 deals with people over 16 and the Children Act 1989 with people under 18.
- 20 Mental Capacity Act 2005 s 21(b). See note 19 *supra*.

UPDATE

757 Powers to make decisions and appoint deputies: general

TEXT AND NOTES 1-11--The principles laid down by the Court of Protection under the Mental Health Acts 1959 and 1983 are no longer of direct application to the exercise of the Court's discretion under the 2005 Act s 16: *Re P* [2009] EWHC 163 (Ch), [2010] Ch 33, [2009] 2 All ER 1198.

TEXT AND NOTES 18-20--Mental Capacity Act 2005 s 21 now s 21(1) and for 'Lord Chancellor' read 'Lord Chief Justice, with the concurrence of the Lord Chancellor': Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No 2) Order 2006, SI 2006/1016. The Lord Chief Justice may nominate any of the following to exercise his functions under the Mental Capacity Act 2005 s 21 (1) the President of the Court of Protection; (2) a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)); Mental Capacity Act 2005 s 21(2) (added by SI 2006/1016). See the Mental Capacity Act 2005 (Transfer of Proceedings) Order 2007, SI 2007/1899.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(8) THE COURT OF PROTECTION AND THE PUBLIC GUARDIAN UNDER THE MENTAL CAPACITY ACT 2005/ (ii) The Court of Protection/758. Powers to make decisions and appoint deputies: personal welfare.

758. Powers to make decisions and appoint deputies: personal welfare.

As from a day to be appointed¹, the powers of the Court of Protection² to make decisions and appoint deputies³ as respects the personal welfare of a person ('P') lacking capacity⁴ extend in particular to:

- 195 (1) deciding where P is to live⁵;
- 196 (2) deciding what contact, if any, P is to have with any specified persons⁶;
- 197 (3) making an order prohibiting a named person from having contact with P⁷;
- 198 (4) giving or refusing consent to the carrying out or continuation of a treatment⁸ by a person providing health care for P⁹;
- 199 (5) giving a direction that a person responsible for P's health care allow a different person to take over that responsibility¹⁰.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 As to the Court of Protection see PARA 750 ante.

3 Ie the court's powers under the Mental Capacity Act 2005 s 16: see PARA 757 ante.

4 As to lack of capacity see PARA 641 note 3 ante.

5 Mental Capacity Act 2005 s 17(1)(a). Section 17(1) is subject to s 20 (restrictions on deputies) (see PARA 760 post): s 17(2).

6 Ibid s 17(1)(b). See note 5 supra.

7 Ibid s 17(1)(c). See note 5 supra.

8 As to the meaning of 'treatment' see PARA 642 note 9 ante.

9 Mental Capacity Act 2005 s 17(1)(d). See note 5 supra.

10 Ibid s 17(1)(e). See note 5 supra.

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759. Powers to make decisions and appoint deputies: property and affairs.

As from a day to be appointed¹, the powers of the Court of Protection² to make decisions and appoint deputies³ as respects the property and affairs of a person ('P') lacking capacity⁴ extend in particular to:

- 200 (1) the control and management of P's property⁵;
- 201 (2) the sale, exchange, charging, gift or other disposition of P's property⁶;
- 202 (3) the acquisition of property in P's name or on P's behalf⁷;
- 203 (4) the carrying on, on P's behalf, of any profession, trade or business⁸;
- 204 (5) the taking of a decision which will have the effect of dissolving a partnership of which P is a member⁹;
- 205 (6) the carrying out of any contract entered into by P¹⁰;
- 206 (7) the discharge of P's debts and of any of P's obligations, whether legally enforceable or not¹¹;
- 207 (8) the settlement of any of P's property, whether for P's benefit or for the benefit of others¹²;
- 208 (9) the execution for P of a will¹³;
- 209 (10) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise¹⁴;
- 210 (11) the conduct of legal proceedings in P's name or on P's behalf¹⁵.

The powers¹⁶ as respects any other matter relating to P's property and affairs may be exercised even though P has not reached 16, if the court considers it likely that P will still lack capacity to make decisions in respect of that matter when he reaches 18¹⁷.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 As to the Court of Protection see PARA 750 ante.

3 As to the court's powers under the Mental Capacity Act 2005 s 16: see PARA 757 ante. For the meaning of 'deputy' see PARA 642 note 18 ante.

4 As to lack of capacity see PARA 641 note 3 ante.

5 Mental Capacity Act 2005 s 18(1)(a). As to the meaning of 'property' see PARA 648 note 2 ante. Section 18(1) is subject to s 20 (restrictions on deputies) (see PARA 760 post): s 18(6). As to supplementary provisions in respect of property and affairs, in particular the making of wills and settlements, see s 18(4), Sch 2; and see notes 6, 12-14 infra.

Supplementary provisions in Sch 2 para 7 apply in regard to the vesting of stock outside England and Wales. If the court is satisfied that: (1) under the law prevailing in a place outside England and Wales a person ('M') has been appointed to exercise powers in respect of the property or affairs of P on the ground (however formulated) that P lacks capacity to make decisions with respect to the management and administration of his property and affairs; and (2) having regard to the nature of the appointment and to the circumstances of the case, it is expedient that the court should exercise its powers under Sch 2 para 7, the court may direct any stocks standing in the name of P or the right to receive dividends from the stocks, to be transferred into M's name or otherwise dealt with as required by M, and may give such directions as the court thinks fit for dealing with accrued dividends from the stocks: Sch 2 para 7(1), (2). 'Stocks' includes: (a) shares; and (b) any funds, annuity

or security transferable in the books kept by any body corporate or unincorporated company or society or by an instrument of transfer either alone or accompanied by other formalities; and 'dividends' is to be construed accordingly: Sch 2 para 7(3). For the meaning of 'England' see PARA 405 note 6 ante; and for the meaning of 'Wales' see PARA 405 note 7 ante.

6 Ibid s 18(1)(b). See note 5 supra.

Supplementary provisions in Sch 2 paras 8, 9 apply in regard to preservation of interests in property disposed of on behalf of persons lacking capacity. If: (1) P's property has been disposed of by virtue of s 18; (2) under P's will or intestacy, or by a gift perfected or nomination taking effect on his death, any other person would have taken an interest in the property but for the disposal; and (3) on P's death, any property belonging to P's estate represents the property disposed of (Sch 2 para 8(1)), then: (a) the person takes the same interest, if and so far as circumstances allow, in the property representing the property disposed of (Sch 2 para 8(2)); and (b) if the property disposed of was real property, any property representing it is to be treated, so long as it remains part of P's estate, as if it were real property (Sch 2 para 8(3)). The court may direct that, on a disposal of P's property which is made by virtue of s 18 and which would apart from this provision result in the conversion of personal property into real property, property representing the property disposed of is to be treated, so long as it remains P's property or forms part of P's estate, as if it were personal property (Sch 2 para 8(4)). References in Sch 2 para 8(1)-(4) to the disposal of property are references to:

- 12 (i) the sale, exchange, charging of or other dealing (otherwise than by will) with property other than money;
- 13 (ii) the removal of property from one place to another;
- 14 (iii) the application of money in acquiring property;
- 15 (iv) the transfer of money from one account to another,

and references to property representing property disposed of are to be construed accordingly and as including the result of successive disposals (Sch 2 para 8(5)). The court may give such directions as appear to it necessary or expedient for the purpose of facilitating the operation of Sch 2 para 8(1)-(3), including the carrying of money to a separate account and the transfer of property other than money (Sch 2 para 8(6)).

If the court has ordered or directed the expenditure of money for carrying out permanent improvements on any of P's property or otherwise for the permanent benefit of any of P's property (Sch 2 para 9(1)), the court may order that: (A) the whole of the money expended or to be expended; or (B) any part of it, is to be a charge on the property either without interest or with interest at a specified rate (Sch 2 para 9(2)). An order under Sch 2 para 9(2) may provide for excluding or restricting the operation of Sch 2 para 8(1)-(3) (Sch 2 para 9(3)). A charge under Sch 2 para 9(2) may be made in favour of such person as may be just and, in particular, where the money charged is paid out of P's general estate, may be made in favour of a person as trustee for P (Sch 2 para 9(4)). No charge under Sch 2 para 9(2) may confer any right of sale or foreclosure during P's lifetime (Sch 2 para 9(5)).

7 Ibid s 18(1)(c). See note 5 supra.

8 Ibid s 18(1)(d). See note 5 supra.

9 Ibid s 18(1)(e). As to partnerships generally see PARTNERSHIP. See note 5 supra.

10 Ibid s 18(1)(f). See note 5 supra.

11 Ibid s 18(1)(g). See note 5 supra.

12 Ibid s 18(1)(h). See note 5 supra.

Supplementary provisions in Sch 2 paras 5, 6 concern vesting orders ancillary to settlement and variation of settlements. If provision is made by virtue of s 18 for the settlement of any property of P or the exercise of a power vested in him of appointing trustees or retiring from a trust, the court may also make as respects the property settled or the trust property such consequential vesting or other orders as the case may require: Sch 2 para 5(1). The power under Sch 2 para 5(1) includes, in the case of the exercise of such a power, any order which could have been made in such a case under the Trustee Act 1925 Pt IV (ss 41-63A) (as amended) (see TRUSTS vol 48 (2007 Reissue) PARA 971 et seq); Mental Capacity Act 2005 Sch 2 para 5(2). If a settlement has been made by virtue of s 18, the court may by order vary or revoke the settlement if: (1) the settlement makes provision for its variation or revocation; (2) the court is satisfied that a material fact was not disclosed when the settlement was made; or (3) the court is satisfied that there has been a substantial change of circumstances: Sch 2 para 6(1). Any such order may give such consequential directions as the court thinks fit: Sch 2 para 6(2).

13 Ibid s 18(1)(i). No will may be made under s 18(1)(i) at a time when P has not reached 18: s 18(2). 'Will' includes codicil: s 64(1). See note 5 supra. As to wills generally see WILLS.

Supplementary provisions in Sch 2 paras 2-4 apply in relation to the execution of a will, by virtue of s 18, on behalf of P: Sch 2 para 1. The will may make any provision (whether by disposing of property or exercising a power or otherwise) which could be made by a will executed by P if he had capacity to make it: Sch 2 para 2. If under s 16 (see PARA 757 ante) the court makes an order or gives directions requiring or authorising a person ('the authorised person') to execute a will on behalf of P, any will executed in pursuance of the order or direction: (1) must state that it is signed by P acting by the authorised person; (2) must be signed by the authorised person with the name of P and his own name, in the presence of two or more witnesses present at the same time; (3) must be attested and subscribed by those witnesses in the presence of the authorised person; and (4) must be sealed with the official seal of the court: Sch 2 para 3(1), (2). As to the official seal see PARA 750 ante.

The following applies where a will is executed in accordance with Sch 2 para 3: (a) the Wills Act 1837 has effect in relation to the will as if it were signed by P by his own hand, except that: (i) s 9 (as substituted) (requirements as to signing and attestation: see WILLS vol 50 (2005 Reissue) PARA 301 et seq) does not apply; and (ii) in the subsequent provisions of the Act any reference to execution in the manner required by the previous provisions is to be read as a reference to execution in accordance with the Mental Capacity Act 2005 Sch 2 para 3 (Sch 2 para 4(1), (2)); (b) the will has the same effect for all purposes as if P had had the capacity to make a valid will, and the will had been executed by him in the manner required by the Wills Act 1837 (Mental Capacity Act 2005 Sch 2 para 4(1), (3)); but (c) the provisions of Sch 2 para 4(3) do not have effect in relation to the will: (i) in so far as it disposes of immovable property outside England and Wales; or (ii) in so far as it relates to any other property or matter if, when the will is executed P is domiciled outside England and Wales, and the following condition is met: that, under the law of P's domicile, any question of his testamentary capacity would fall to be determined in accordance with the law of a place outside England and Wales (Sch 2 para 4(1), (4), (5)).

14 Ibid s 18(1)(j). As to trustees generally see TRUSTS. See note 5 supra.

Supplementary provisions in Sch 2 para 10 concern powers as patron of a benefice. Any functions which P has as patron of a benefice may be discharged only by a person ('R') appointed by the court: Sch 2 para 10(1). R must be an individual capable of appointment under the Patronage (Benefices) Measure 1986 (No 3) s 8(1)(b) (which provides for an individual able to make a declaration of communicant status, a clerk in Holy Orders, etc to be appointed to discharge a registered patron's functions: see ECCLESIASTICAL LAW); Mental Capacity Act 2005 Sch 2 para 10(2). The Patronage (Benefices) Measure 1986 (No 3) applies to R as it applies to an individual appointed by the registered patron of the benefice under s 8(1)(b) or s 8(3) to discharge his functions as patron: Mental Capacity Act 2005 Sch 2 para 10(3). As to benefices generally see ECCLESIASTICAL LAW vol 14 para 768 et seq; and as to patronage see ECCLESIASTICAL LAW vol 14 para 776 et seq.

15 Ibid s 18(1)(k). See note 5 supra.

16 Ie the powers under ibid s 16: see PARA 757 ante.

17 Ibid s 18(3). See also note 13 supra.

UPDATE

759 Powers to make decisions and appoint deputies: property and affairs

TEXT AND NOTES--The principles laid down by the Court of Protection under the Mental Health Acts 1959 and 1983 are no longer of direct application to the exercise of the Court's discretion under the 2005 Act s 18: *Re P* [2009] EWHC 163 (Ch), [2010] Ch 33, [2009] 2 All ER 1198.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(8) THE COURT OF PROTECTION AND THE PUBLIC GUARDIAN UNDER THE MENTAL CAPACITY ACT 2005/ (ii) The Court of Protection/760. Deputies.

760. Deputies.

As from a day to be appointed¹, a deputy² appointed by the Court of Protection³ must be an individual who has reached 18⁴ or, as respects powers in relation to property and affairs⁵, an individual who has reached 18 or a trust corporation⁶. A person may not be appointed as a deputy without his consent⁷.

The court may appoint an individual by appointing the holder for the time being of a specified office or position⁸. The court may also appoint two or more deputies to act jointly, jointly and severally, or jointly in respect of some matters and jointly and severally in respect of others⁹. When appointing a deputy or deputies, the court may at the same time appoint one or more other persons to succeed the existing deputy or those deputies in such circumstances, or on the happening of such events, as may be specified by the court¹⁰, for such period as may be so specified¹¹.

A deputy is to be treated as the agent of the person ('P') lacking capacity¹² in relation to anything done or decided by him within the scope of his appointment and in accordance with Part 1 of the Mental Capacity Act 2005¹³. The deputy is entitled to be reimbursed out of P's property for his reasonable expenses in discharging his functions¹⁴, and if the court so directs when appointing him, to remuneration out of P's property¹⁵ for discharging them¹⁶.

The court may confer on a deputy powers to: (1) take possession or control of all or any specified part of P's property¹⁷; (2) exercise all or any specified powers in respect of it, including such powers of investment as the court may determine¹⁸. The court may require a deputy to give to the Public Guardian¹⁹ such security as the court thinks fit for the due discharge of his functions²⁰, and to submit to the Public Guardian such reports at such times or at such intervals as the court may direct²¹.

There are a number of restrictions on the powers of deputies. For example, a deputy does not have power to make a decision on behalf of P in relation to a matter if he knows or has reasonable grounds for believing that P has capacity in relation to the matter²². Nothing in the provisions relating to powers concerning personal welfare²³ permits a deputy to be given power to prohibit a named person from having contact with P²⁴, or to direct a person responsible for P's health care to allow a different person to take over that responsibility²⁵. A deputy may not be given powers with respect to the settlement of any of P's property, whether for P's benefit or for the benefit of others²⁶, the execution for P of a will²⁷, or the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise²⁸. A further restriction is that a deputy may not be given power to make a decision on behalf of P which is inconsistent with a decision made, within the scope of his authority and in accordance with the Mental Capacity Act 2005, by the donee of a lasting power of attorney²⁹ granted by P (or, if there is more than one donee, by any of them)³⁰. A deputy may not refuse consent to the carrying out or continuation of life-sustaining treatment³¹ in relation to P³².

The authority conferred on a deputy is subject to the provisions of the Mental Capacity Act 2005³³.

A deputy may not do an act that is intended to restrain³⁴ P unless four conditions are satisfied³⁵:

- 211 (a) in doing the act, the deputy is acting within the scope of an authority expressly conferred on him by the court³⁶;

- 212 (b) P lacks, or the deputy reasonably believes that P lacks, capacity in relation to the matter in question³⁷;
- 213 (c) the deputy reasonably believes that it is necessary to do the act in order to prevent harm to P³⁸;
- 214 (d) the act is a proportionate response to the likelihood of P's suffering harm, or the seriousness of that harm³⁹.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally, and for transitional provisions relating to receivers and deputies, see PARA 406 ante.

2 For the meaning of 'deputy' see PARA 642 note 18 ante. See also PARAS 757-759 ante. As to the supervision of deputies by the Public Guardian see PARA 762 post.

3 As to the Court of Protection see PARA 750 ante.

4 Mental Capacity Act 2005 s 19(1)(a).

5 As to the powers in relation to property and affairs see PARA 759 ante.

6 Mental Capacity Act 2005 s 19(1)(b). For the meaning of 'trust corporation' see PARA 648 note 6 ante.

7 Ibid s 19(3).

8 Ibid s 19(2).

9 Ibid s 19(4).

10 Ibid s 19(5)(a).

11 Ibid s 19(5)(b).

12 As to lack of capacity see PARA 641 note 3 ante.

13 Mental Capacity Act 2005 s 19(6). The reference in the text is a reference to Pt 1 (ss 1-44) (see PARAS 641-670, 756-759 ante). As to agents generally see AGENCY vol 1 (2008) PARA 1 et seq.

14 Ibid s 19(7)(a).

15 As to the meaning of 'property' see PARA 648 note 2 ante.

16 Mental Capacity Act 2005 s 19(7)(b).

17 Ibid s 19(8)(a).

18 Ibid s 19(8)(b).

19 For the meaning of 'Public Guardian' see PARA 751 note 14 ante. See also PARA 761 et seq post.

20 Mental Capacity Act 2005 s 19(9)(a).

21 Ibid s 19(9)(b).

22 Ibid s 20(1).

23 Ie ibid s 16(5) (see PARA 757 ante) or s 17 (see PARA 758 ante).

24 Ibid s 20(2)(a).

25 Ibid s 20(2)(b).

26 Ibid s 20(3)(a). As to the powers concerning settlement, the execution of a will, and the exercise of any other relevant power see PARAS 757, 759 ante.

27 Ibid s 20(3)(b). See note 26 supra.

28 Ibid s 20(3)(c). See note 26 supra.

29 For the meaning of 'lasting power of attorney' see PARA 642 note 16 ante. See PARA 647 et seq ante.

30 Mental Capacity Act 2005 s 20(4).

31 For the meaning of 'life-sustaining treatment' see PARA 642 note 9 ante.

32 Mental Capacity Act 2005 s 20(5).

33 Ibid s 20(6). In particular, his authority is subject to s 1 (the principles: see PARA 641 ante) and s 4 (best interests: see PARA 642 ante).

34 For the purposes of ibid s 20, a deputy restrains P if he:

16 (1) uses, or threatens to use, force to secure the doing of an act which P resists; or

17 (2) restricts P's liberty of movement, whether or not P resists,

or if he authorises another person to do any of those things: s 20(12). However, a deputy does more than merely restrain P if he deprives P of his liberty within the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 5(1) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 127 et seq), whether or not the deputy is a public authority: Mental Capacity Act 2005 s 20(13). 'Public authority' has the same meaning as in the Human Rights Act 1998 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS): Mental Capacity Act 2005 s 64(1). See also PARA 644 note 9 ante.

35 Ibid s 20(7).

36 Ibid s 20(8).

37 Ibid s 20(9).

38 Ibid s 20(10).

39 Ibid s 20(11).

UPDATE

760 Deputies

NOTE 34--Mental Capacity Act 2005 s 20(13) repealed: Mental Health Act 2007 s 50(4) (c), Sch 11 Pt 10.

NOTE 39--Mental Capacity Act 2005 s 20(11) amended: Mental Health Act 2007 s 51.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(8) THE COURT OF PROTECTION AND THE PUBLIC GUARDIAN UNDER THE MENTAL CAPACITY ACT 2005/(iii) The Public Guardian/761. In general.

(iii) The Public Guardian

761. In general.

As from a day to be appointed¹, for the purposes of the Mental Capacity Act 2005, there is to be a new officer, to be known as the Public Guardian², who is to be appointed by the Lord Chancellor³.

The Public Guardian is to be paid out of money provided by Parliament such salary as the Lord Chancellor may determine⁴. The Lord Chancellor may, after consulting the Public Guardian, provide him with such officers and staff or enter into such contracts with other persons for the provision (by them or their sub-contractors) of officers, staff or services, as the Lord Chancellor thinks necessary for the proper discharge of the Public Guardian's functions⁵.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 Ibid s 57(1).

3 Ibid s 57(2). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

4 Ibid s 57(3). As to Parliament generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 201 et seq; PARLIAMENT vol 78 (2010) PARA 1.

5 Ibid s 57(4). Any functions of the Public Guardian may, to the extent authorised by him, be performed by any of his officers: s 57(5). As to the Public Guardian's functions see PARA 762 post.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(8) THE COURT OF PROTECTION AND THE PUBLIC GUARDIAN UNDER THE MENTAL CAPACITY ACT 2005/(iii) The Public Guardian/762. Functions of the Public Guardian.

762. Functions of the Public Guardian.

As from a day to be appointed¹, the Public Guardian² has the following functions:

- 215 (1) establishing and maintaining a register of lasting powers of attorney³;
- 216 (2) establishing and maintaining a register of orders appointing deputies⁴;
- 217 (3) supervising deputies appointed by the Court of Protection⁵;
- 218 (4) directing a Court of Protection Visitor⁶ to visit a donee of a lasting power of attorney, a deputy appointed by the court or the person granting the power of attorney or for whom the deputy is appointed ('P'), and to make a report to the Public Guardian on such matters as he may direct⁷;
- 219 (5) receiving security which the court requires a person to give for the discharge of his functions⁸;
- 220 (6) receiving reports from donees of lasting powers of attorney and deputies appointed by the court⁹;
- 221 (7) reporting to the court on such matters relating to proceedings under the Mental Capacity Act 2005 as the court requires¹⁰;
- 222 (8) dealing with representations (including complaints) about the way in which a donee of a lasting power of attorney or a deputy appointed by the court is exercising his powers¹¹;
- 223 (9) publishing, in any manner the Public Guardian thinks appropriate, any information he thinks appropriate about the discharge of his functions¹².

The Lord Chancellor may by regulations make provision¹³: (a) conferring on the Public Guardian other functions in connection with the Mental Capacity Act 2005¹⁴; (b) in connection with the discharge by the Public Guardian of his functions¹⁵.

For the purpose of enabling him to carry out his functions, the Public Guardian may, at all reasonable times, examine and take copies of: (i) any health record¹⁶; (ii) any record of a local authority¹⁷, or held by it, compiled in connection with a social services function¹⁸; and (iii) any record held by a person registered under Part II of the Care Standards Act 2000¹⁹, so far as the record relates to P²⁰. The Public Guardian may also, for the purpose of enabling him to carry out his functions, interview P in private²¹.

The Public Guardian must make an annual report to the Lord Chancellor about the discharge of his functions²².

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 As to the Public Guardian generally see PARA 761 ante.

3 Mental Capacity Act 2005 s 58(1)(a). For the meaning of 'lasting power of attorney' see PARA 642 note 16 ante. See also PARA 647 et seq ante.

4 Ibid s 58(1)(b). For the meaning of 'deputy' see PARA 642 note 18 ante; and see also PARA 757 ante. As to the appointment of deputies see PARA 760 ante.

5 Ibid s 58(1)(c). The functions conferred by s 58(1)(c), (h) (see the text and note 11 *infra*) may be discharged in co-operation with any other person who has functions in relation to the care or treatment of P: s 58(2). As to the Court of Protection see PARA 750 *ante*.

6 For the meaning of 'Court of Protection Visitor' see PARA 751 note 15 *ante*. See also PARA 764 *post*.

7 Mental Capacity Act 2005 s 58(1)(d).

8 Ibid s 58(1)(e).

9 Ibid s 58(1)(f).

10 Ibid s 58(1)(g).

11 Ibid s 58(1)(h). See note 5 *supra*.

12 Ibid s 58(1)(i).

13 As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 *et seq*. As to subordinate legislation generally see PARA 406 note 68 *ante*.

14 Mental Capacity Act 2005 s 58(3)(a).

15 Ibid s 58(3)(b). Regulations made under s 58(3)(b) may in particular make provision as to: (1) the giving of security by deputies appointed by the court and the enforcement and discharge of security so given; (2) the fees which may be charged by the Public Guardian; (3) the way in which, and funds from which, such fees are to be paid; (4) exemptions from and reductions in such fees; (5) remission of such fees in whole or in part; (6) the making of reports to the Public Guardian by deputies appointed by the court and others who are directed by the court to carry out any transaction for a person who lacks capacity: s 58(4).

16 Ibid s 58(5)(a). For the meaning of 'health record' see PARA 664 note 10 *ante*.

17 For the meaning of 'local authority' see PARA 664 note 11 *ante*.

18 Mental Capacity Act 2005 s 58(5)(b). For the meaning of 'social services function' see PARA 664 note 12 *ante*.

19 Ibid s 58(5)(c). The reference in the text is a reference to the Care Standards Act 2000 Pt II (ss 11-42) (as amended; prospectively amended) (see PARA 432 *ante*; and SOCIAL SERVICES AND COMMUNITY CARE).

20 Mental Capacity Act 2005 s 58(5).

21 Ibid s 58(6).

22 Ibid s 60(1). The Lord Chancellor must, within one month of receiving the report, lay a copy of it before Parliament: s 60(2).

UPDATE

762 Functions of the Public Guardian

NOTES 14, 15--See Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253; and AGENCY vol 1 (2008) PARA 202 *et seq*.

NOTE 15--As to the fees charged in connection with the functions carried out by the Public Guardian, see the Public Guardian (Fees, etc) Regulations 2007, SI 2007/2051 (amended by SI 2007/2616, SI 2009/514, SI 2010/1062).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(8) THE COURT OF PROTECTION AND THE PUBLIC GUARDIAN UNDER THE MENTAL CAPACITY ACT 2005/(iii) The Public Guardian/763. The Public Guardian Board.

763. The Public Guardian Board.

As from a day to be appointed¹, there is to be a body, to be known as the Public Guardian Board². Its duty is to scrutinise and review the way in which the Public Guardian³ discharges his functions and to make such recommendations to the Lord Chancellor⁴ about that matter as it thinks appropriate⁵. The Lord Chancellor must, in discharging his functions concerning the Public Guardian⁶, give due consideration to recommendations made by the Board⁷.

The members of the Board are to be appointed by the Lord Chancellor⁸, and the Board must have: (1) at least one member who is a judge of the Court of Protection⁹; and (2) at least four members who are persons appearing to the Lord Chancellor to have appropriate knowledge or experience of the work of the Public Guardian¹⁰.

The Lord Chancellor may by regulations make provision as to:

- 224 (a) the appointment of members of the Board (and, in particular, the procedures to be followed in connection with appointments)¹¹;
- 225 (b) the selection of one of the members to be the chairman¹²;
- 226 (c) the term of office of the chairman and members¹³;
- 227 (d) their resignation, suspension or removal¹⁴;
- 228 (e) the procedure of the Board (including quorum)¹⁵;
- 229 (f) the validation of proceedings in the event of a vacancy among the members or a defect in the appointment of a member¹⁶.

Subject to any provision made in reliance on head (c) or head (d) above, a person is to hold and vacate office as a member of the Board in accordance with the terms of the instrument appointing him¹⁷.

The Lord Chancellor may make such payments to or in respect of members of the Board by way of reimbursement of expenses, allowances and remuneration as he may determine¹⁸.

The Board must make an annual report to the Lord Chancellor about the discharge of its functions¹⁹.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 Ibid s 59(1).

3 As to the Public Guardian generally see PARA 761 ante.

4 As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

5 Mental Capacity Act 2005 s 59(2).

6 In his functions under ibid ss 57, 58: see PARAS 761-762 ante.

7 Ibid s 59(3).

8 Ibid s 59(4).

- 9 Ibid s 59(5)(a). As to the Court of Protection and its judges see PARA 750 ante.
- 10 Ibid s 59(5)(b).
- 11 Ibid s 59(6)(a). As to subordinate legislation generally see PARA 406 note 68 ante.
- 12 Ibid s 59(6)(b).
- 13 Ibid s 59(6)(c).
- 14 Ibid s 59(6)(d).
- 15 Ibid s 59(6)(e).
- 16 Ibid s 59(6)(f).
- 17 Ibid s 59(7).
- 18 Ibid s 59(8).
- 19 Ibid s 59(9).

UPDATE

763 The Public Guardian Board

TEXT AND NOTES--Mental Capacity Act 2005 s 59(5A), (5B), (10) added: SI 2006/1016.

TEXT AND NOTE 8--Mental Capacity Act 2005 s 59(4) omitted: SI 2006/1016.

TEXT AND NOTES 11-16--As to regulations made under the 2005 Act s 59(6), see the Public Guardian Board Regulations 2007, SI 2007/1770.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/6. MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS/(8) THE COURT OF PROTECTION AND THE PUBLIC GUARDIAN UNDER THE MENTAL CAPACITY ACT 2005/(iv) Court of Protection Visitors/764. Court of Protection Visitors.

(iv) Court of Protection Visitors

764. Court of Protection Visitors.

As from a day to be appointed¹, provision is made in relation to Court of Protection Visitors. A Court of Protection Visitor is a person who is appointed by the Lord Chancellor² to a panel of Special Visitors, or a panel of General Visitors³.

A Court of Protection Visitor may be appointed for such term and subject to such conditions, and may be paid such remuneration and allowances, as the Lord Chancellor may determine⁴.

For the purpose of carrying out his functions under the Mental Capacity Act 2005 in relation to a person who lacks capacity ('P'), a Court of Protection Visitor may, at all reasonable times, examine and take copies of: (1) any health record⁵; (2) any record of a local authority⁶, or held by it, compiled in connection with a social services function⁷; and (3) any record held by a person registered under Part II of the Care Standards Act 2000⁸, so far as the record relates to P⁹. A Court of Protection Visitor may also, for the purpose of carrying out his functions, interview P in private¹⁰.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

3 Mental Capacity Act 2005 s 61(1). The function and powers of the Court Of Protection Visitors are not dissimilar to those of the Lord Chancellor's Visitors under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed): see PARA 747 ante.

A person is not qualified to be a Special Visitor unless he: (1) is a registered medical practitioner or appears to the Lord Chancellor to have other suitable qualifications or training; and (2) appears to the Lord Chancellor to have special knowledge of and experience in cases of impairment of or disturbance in the functioning of the mind or brain: Mental Capacity Act 2005 s 61(2). A General Visitor need not have a medical qualification: s 61(3). For the meaning of 'registered medical practitioner' see PARA 460 note 13 ante.

4 Ibid s 61(4). As to subordinate legislation generally see PARA 406 note 68 ante.

5 Ibid s 61(5)(a). For the meaning of 'health record' see PARA 664 note 10 ante.

6 For the meaning of 'local authority' see PARA 664 note 11 ante.

7 Mental Capacity Act 2005 s 61(5)(b). For the meaning of 'social services function' see PARA 664 note 12 ante.

8 Ibid s 61(5)(c). The reference in the text is a reference to the Care Standards Act 2000 Pt II (ss 11-42) (as amended; prospectively amended) (see PARA 432 ante; and SOCIAL SERVICES AND COMMUNITY CARE).

9 Mental Capacity Act 2005 s 61(5).

10 Ibid s 61(6).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/7. OFFENCES/765.
Forgery of statutory documents with intent to deceive.

7. OFFENCES

765. Forgery of statutory documents with intent to deceive.

Any person who without lawful authority or excuse has in his custody or under his control any specified document which is, and which he knows or believes to be, false within the meaning of Part I of the Forgery and Counterfeiting Act 1981¹ is guilty of an offence².

Also guilty of an offence is any person who without lawful authority or excuse makes, or has in his custody or under his control, any document so closely resembling a specified document as to be calculated to deceive³.

The specified documents are any document purporting to be: (1) an application under Part II of the Mental Health Act 1983⁴; (2) a medical or other recommendation or report under that Act⁵; and (3) any other document⁶ required or authorised to be made for any of the purposes of that Act⁷.

1 The Forgery and Counterfeiting Act 1981 Pt I (ss 1-13) (as amended). For the meaning of 'false' see s 9; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 346.

2 Mental Health Act 1983 s 126(1). Proceedings under the Mental Health Act 1983 s 126 (as amended) may be instituted by a local social services authority: see s 130; and PARA 431 ante. As to the offence of false descriptions of establishments and agencies under the Care Standards Act 2000 see s 26; and SOCIAL SERVICES AND COMMUNITY CARE. As to registered establishments under the Care Standards Act 2000 see PARA 421 ante.

3 Mental Health Act 1983 s 126(2). To deceive is to induce a man to believe a thing to be true which is false and which the person practising the deceit knows or believes to be false: *Re London and Globe Finance Corp'n Ltd* [1903] 1 Ch 728 at 732 per Buckley J. It also includes the inducing of a person to believe a thing to be false which is true: *Welham v DPP* [1961] AC 103, [1960] 1 All ER 805, HL, per Lord Radcliffe. For the meaning of 'deception' in the Theft Act 1968 see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 310.

4 The Mental Health Act 1983 Pt II (ss 2-34) (as amended). As to such applications see PARAS 460-462, 469 ante.

5 As to medical recommendations see PARAS 460-462, 469 ante. As to medical reports see eg paras 463, 520, 525, 527 ante.

6 Eg a report by a nurse (see PARA 463 ante), a record of admission (see PARA 464 ante), or an order for discharge (see PARA 523 ante).

7 Mental Health Act 1983 s 126(3) (amended by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 17). Any person guilty of an offence is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both, or on conviction on indictment to imprisonment for a term not exceeding two years or a fine of any amount or both: s 126(5). The 'statutory maximum', with reference to a fine or penalty on summary conviction for an offence, is the prescribed sum within the meaning of the Magistrates' Courts Act 1980 s 32 (as amended): see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140; and MAGISTRATES vol 29(2) (Reissue) PARA 804. The 'prescribed sum' means £5,000 or such sum as is for the time being substituted in this definition by order under the Magistrates' Courts Act 1980 s 143(1) (as substituted): see s 32(9) (amended by the Criminal Justice Act 1991 s 17(2)); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/7. OFFENCES/766.
Wilfully making a false entry or statement.

766. Wilfully making a false entry or statement.

Any person who wilfully makes a false entry or statement in any application, recommendation, report, record or other document required or authorised to be made for any of the purposes of the Mental Health Act 1983¹ or, with intent to deceive, makes use of any such entry or statement which he knows to be false, commits an offence².

1 As to such documents see PARA 765 text to notes 4-7 ante.

2 Mental Health Act 1983 s 126(4). A local social services authority may institute proceedings for an offence under this provision: see s 130; and PARA 431 ante. For the penalties see PARA 765 note 7 ante. As to the offence of false descriptions in registration applications under the Care Standards Act 2000 see s 27; and SOCIAL SERVICES AND COMMUNITY CARE. As to registered establishments under the Care Standards Act 2000 see PARA 421 ante.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/7. OFFENCES/767. Ill-treatment or wilful neglect under the Mental Health Act 1983.

767. Ill-treatment or wilful neglect under the Mental Health Act 1983.

It is an offence for any person who is a manager¹ or officer on the staff of or otherwise employed in, a hospital² or independent hospital³ or care home⁴: (1) to ill-treat⁵ or wilfully to neglect⁶ a patient for the time being receiving treatment for mental disorder⁷ as an in-patient in that hospital or home; or (2) to ill-treat or wilfully to neglect, on the premises of which the hospital or home forms part, an out-patient for the time being receiving such treatment there⁸.

Any individual who ill-treats⁹ or wilfully neglects¹⁰ a mentally disordered patient who is subject to his guardianship¹¹ or otherwise in his custody or care, whether by virtue of any legal or moral obligation or otherwise, commits an offence¹².

It is also an offence for any individual to ill-treat¹³ or wilfully neglect¹⁴ a mentally disordered patient who is for the time being subject to after-care under supervision¹⁵.

1 For the meaning of 'manager' see PARA 439 ante.

2 For the meaning of 'hospital' see PARA 417 ante.

3 For the meaning of 'independent hospital' see PARA 421 note 5 ante.

4 For the meaning of 'care home' see PARA 430 note 7 ante.

5 A single act (eg one slap to the patient's face) is sufficient to show ill-treatment: *R v Holmes* [1979] Crim LR 52. Ill-treatment is any deliberate conduct which could properly be described as ill-treatment, whether or not it had caused or was likely to cause harm. The accused must either realise that he is inexcusably ill-treating the patient or be reckless as to whether he is doing so: *R v Newington* (1990) 91 Cr App Rep 247, CA.

6 Ill-treatment and wilful neglect are two separate offences: *R v Newington* (1990) 91 Cr App Rep 247, CA. In the context of the offence of wilfully neglecting a child in a manner likely to cause unnecessary suffering or injury to health under the Children and Young Persons Act 1933 s 1 (as amended), it has been held that neglect cannot be described as 'wilful' unless the person either: (1) had directed his mind to whether there was some risk (though it might fall far short of a probability) that the child's health might suffer from the neglect and had made a conscious decision to refrain from acting; or (2) had so refrained because he did not care whether the child might be at risk or not: *R v Sheppard* [1981] AC 394, [1980] 3 All ER 899, HL. See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 611. As to genuine mistake in failing to treat a patient rather than wilful neglect see *R v Morrell* [2002] EWCA Crim 2547, [2002] All ER (D) 372 (Nov).

7 For the meaning of 'mental disorder' see PARA 402 ante.

8 Mental Health Act 1983 s 127(1) (amended by the Care Standards Act 2000 s 116, Sch 4 para 9(1), (8)). A person guilty of an offence under the Mental Health Act 1983 s 127 (as amended) is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both, or on conviction on indictment to imprisonment for a term not exceeding two years or a fine or both: s 127(3). As to the statutory maximum see PARA 765 note 7 ante. Proceedings for an offence under s 127 (as amended) must not be instituted except by or with the consent of the Director of Public Prosecutions: s 127(4). Subject to this provision, proceedings may be instituted by a local social services authority: see s 130; and PARA 431 ante. As to the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARAS 1066, 1079 et seq. As to the status of a hospital where there is a charge under the Mental Health Act 1983 s 127 (as amended) see *R v Davies* [1999] All ER (D) 1450, CA. As to ill-treatment or wilful neglect under the Mental Capacity Act 2005 see PARA 768 post.

9 See note 5 supra.

10 See note 6 supra.

11 Ie under the Mental Health Act 1983. As to such guardianship see PARAS 469, 502 ante.

12 Ibid s 127(2). As to the penalties, and as to the institution of proceedings, see note 8 supra.

13 See note 5 supra.

14 See note 6 supra.

15 Mental Health Act 1983 s 127(2A) (added by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 18). As to after-care under supervision to para 528 et seq ante.

UPDATE

767 Ill-treatment or wilful neglect under the Mental Health Act 1983

NOTE 8--Maximum term of imprisonment on conviction on indictment now five years: 1983 Act s 127(3) (amended by Mental Health Act 2007 s 42).

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/7. OFFENCES/768. Ill-treatment or wilful neglect under the Mental Capacity Act 2005.

768. Ill-treatment or wilful neglect under the Mental Capacity Act 2005.

As from a day to be appointed¹, a person ('D') who:

- 230 (1) has the care of a person ('P') who lacks, or whom D reasonably believes to lack, capacity²;
- 231 (2) is the donee of a lasting power of attorney³, or an enduring power of attorney⁴, created by P⁵; or
- 232 (3) is a deputy⁶ appointed by the Court of Protection⁷ for P⁸,

is guilty of an offence if he ill-treats or wilfully neglects P⁹.

1 At the date at which this volume states the law the Mental Capacity Act 2005 had not been brought into force. As to commencement see PARA 406 note 43 ante. As to the Mental Capacity Act 2005 generally see PARA 406 ante.

2 Ibid s 44(1)(a). As to lacking capacity see PARA 641 note 3 ante.

3 For the meaning of 'lasting power of attorney' see PARA 642 note 16 ante. See also PARA 647 et seq ante.

4 Ie within the meaning of the Mental Capacity Act 2005 Sch 4: see PARA 647 ante; and AGENCY vol 1 (2008) PARA 195 et seq. See also PARA 673 ante.

5 Ibid s 44(1)(b).

6 For the meaning of 'deputy' see PARA 642 note 18 ante. See also PARA 757 ante.

7 As to the Court of Protection see PARA 750 ante.

8 Mental Capacity Act 2005 s 44(1)(c).

9 Ibid s 44(2). A person guilty of an offence under s 44 is liable: (1) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both; (2) on conviction on indictment, to imprisonment for a term not exceeding five years or a fine or both: s 44(3). As to the statutory maximum see PARA 765 note 7 ante. As to ill-treatment or wilful neglect under the Mental Health Act 1983 see PARA 767 ante.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/7. OFFENCES/769.
Unlawful sexual activity with persons with a mental disorder.

769. Unlawful sexual activity with persons with a mental disorder.

Under the Sexual Offences Act 2003¹, there are various offences involving sexual activity with persons with a mental disorder², which are dealt with elsewhere in this work. These offences include:

- 233 (1) sexual activity with a person with a mental disorder impeding choice³;
- 234 (2) causing or inciting a person, with a mental disorder impeding choice, to engage in sexual activity⁴;
- 235 (3) engaging in sexual activity in the presence of a person with a mental disorder impeding choice⁵;
- 236 (4) causing a person, with a mental disorder impeding choice, to watch a sexual act⁶;
- 237 (5) inducement, threat or deception to procure sexual activity with a person with a mental disorder⁷;
- 238 (6) causing a person with a mental disorder to engage in or agree to engage in sexual activity by inducement, threat or deception⁸;
- 239 (7) engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder⁹;
- 240 (8) causing a person with a mental disorder to watch a sexual act by inducement, threat or deception¹⁰.

There are also offences relating specifically to care workers, namely:

- 241 (a) sexual activity with a person with a mental disorder¹¹;
- 242 (b) causing or inciting sexual activity¹²;
- 243 (c) sexual activity in the presence of a person with a mental disorder¹³; and
- 244 (d) causing a person with a mental disorder to watch a sexual act¹⁴.

1 The Sexual Offences Act 2003 ss 30-44 (prospectively amended): see the text and notes 3-14 *infra*; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 196 *et seq*. As to the penalties for offences under these provisions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 201, 206, 214.

2 For the purposes of *ibid* Pt 1 (ss 1-79) (as amended; prospectively amended), 'mental disorder' has the same meaning as in the Mental Health Act 1983 s 1 (see PARA 402 *ante*): Sexual Offences Act 2003 s 79(6).

3 A person ('A') commits an offence if: (1) he intentionally touches another person ('B'); (2) the touching is sexual; (3) B is unable to refuse because of or for a reason related to a mental disorder; and (4) A knows or could reasonably be expected to know that B has a mental disorder and that because of it or for a reason related to it B is likely to be unable to refuse: see *ibid* s 30; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 197.

4 A person ('A') commits an offence if: (1) he intentionally causes or incites another person ('B') to engage in an activity; (2) the activity is sexual; (3) B is unable to refuse because of or for a reason related to a mental disorder; and (4) A knows or could reasonably be expected to know that B has a mental disorder and that because of it or for a reason related to it B is likely to be unable to refuse: see *ibid* s 31; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 198.

5 A person ('A') commits an offence if: (1) he intentionally engages in an activity; (2) the activity is sexual; (3) for the purpose of obtaining sexual gratification, he engages in it: (a) when another person ('B') is present or is in a place from which A can be observed; and (b) knowing or believing that B is aware, or intending that B should be aware, that he is engaging in it; (4) B is unable to refuse because of or for a reason related to a mental disorder; and (5) A knows or could reasonably be expected to know that B has a mental disorder and

that because of it or for a reason related to it B is likely to be unable to refuse: see *ibid* s 32; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 199.

6 A person ('A') commits an offence if: (1) for the purpose of obtaining sexual gratification, he intentionally causes another person ('B') to watch a third person engaging in an activity, or to look at an image of any person engaging in an activity; (2) the activity is sexual; (3) B is unable to refuse because of or for a reason related to a mental disorder; and (4) A knows or could reasonably be expected to know that B has a mental disorder and that because of it or for a reason related to it B is likely to be unable to refuse: see *ibid* s 33; and CRIMINAL LAW, EVIDENCE AND PROCEDURE 11(1) (2006 Reissue) PARA 200.

7 A person ('A') commits an offence if: (1) with the agreement of another person ('B') he intentionally touches that person; (2) the touching is sexual; (3) A obtains B's agreement by means of an inducement offered or given, a threat made or a deception practised by A for that purpose; (4) B has a mental disorder; and (5) A knows or could reasonably be expected to know that B has a mental disorder: see *ibid* s 34; and CRIMINAL LAW, EVIDENCE AND PROCEDURE 11(1) (2006 Reissue) PARA 202.

8 A person ('A') commits an offence if: (1) by means of an inducement offered or given, a threat made or a deception practised by him for this purpose, he intentionally causes another person ('B') to engage in, or to agree to engage in, an activity; (2) the activity is sexual; (3) B has a mental disorder; and (4) A knows or could reasonably be expected to know that B has a mental disorder: see *ibid* s 35; and CRIMINAL LAW, EVIDENCE AND PROCEDURE 11(1) (2006 Reissue) PARA 203.

9 A person ('A') commits an offence if: (1) he intentionally engages in an activity; (2) the activity is sexual; (3) for the purpose of obtaining sexual gratification, he engages in it: (a) when another person ('B') is present or is in a place from which A can be observed; and (b) knowing or believing that B is aware, or intending that B should be aware, that he is engaging in it; (4) B agrees to be present or in the place referred to in head (3)(a) supra because of an inducement offered or given, a threat made or a deception practised by A for the purpose of obtaining that agreement; (5) B has a mental disorder; and (6) A knows or could reasonably be expected to know that B has a mental disorder: see *ibid* s 36; and CRIMINAL LAW, EVIDENCE AND PROCEDURE 11(1) (2006 Reissue) PARA 204.

10 A person ('A') commits an offence if: (1) for the purpose of obtaining sexual gratification, he intentionally causes another person ('B') to watch a third person engaging in an activity, or to look at an image of any person engaging in an activity; (2) the activity is sexual; (3) B agrees to watch or look because of an inducement offered or given, a threat made or a deception practised by A for the purpose of obtaining that agreement; (4) B has a mental disorder; and (5) A knows or could reasonably be expected to know that B has a mental disorder: see *ibid* s 37; and CRIMINAL LAW, EVIDENCE AND PROCEDURE 11(1) (2006 Reissue) PARA 205.

11 A person ('A') commits an offence if: (1) he intentionally touches another person ('B'); (2) the touching is sexual; (3) B has a mental disorder; (4) A knows or could reasonably be expected to know that B has a mental disorder; and (5) A is involved in B's care in a way that falls within *ibid* s 42: see s 38; and CRIMINAL LAW, EVIDENCE AND PROCEDURE 11(1) (2006 Reissue) PARA 207.

For the purposes of ss 38-41, a person ('A') is involved in the care of another person ('B') in a way that falls within s 42 if any of the following applies:

- 18 (a) B is accommodated and cared for in a care home, community home, voluntary home or children's home, and A has functions to perform in the home in the course of employment which have brought him or are likely to bring him into regular face to face contact with B (see s 42(1), (2));
- 19 (b) if B is a patient for whom services are provided by a National Health Service body or an independent medical agency, or in an independent clinic or an independent hospital, and A has functions to perform for the body or agency or in the clinic or hospital in the course of employment which have brought him or are likely to bring him into regular face to face contact with B (see s 42(1), (3));
- 20 (c) if A is, whether or not in the course of employment, a provider of care, assistance or services to B in connection with B's mental disorder, and as such, has had or is likely to have regular face to face contact with B (see s 42(1), (4)).

For the purposes of s 42, 'care home' means an establishment which is a care home for the purposes of the Care Standards Act 2000 (see PARA 430 note 7 ante); 'children's home' has the meaning given by s 1 (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 983; SOCIAL SERVICES AND COMMUNITY CARE); 'community home' has the meaning given by the Children Act 1989 s 53 (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 967); 'employment' means any employment, whether paid or unpaid and whether under a contract of service or apprenticeship, under a contract for services, or otherwise than under a contract; 'independent clinic', 'independent hospital' and 'independent medical agency' have the meanings given by the Care Standards Act 2000 s 2 (as amended) (see PARA 421 note 5 ante; and SOCIAL SERVICES AND COMMUNITY CARE);

'National Health Service body' means a health authority (see PARA 414 note 6 ante), an NHS trust (see HEALTH SERVICES vol 54 (2008) PARA 155 et seq), a primary care trust (see PARA 414 note 6 ante), or a special health authority (see PARA 410 note 13 ante); and 'voluntary home' has the meaning given by the Children Act 1989 s 60(3) (as substituted) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 976): see the Sexual Offences Act 2003 s 42(5).

Conduct by a person ('A') which would otherwise be an offence under any of ss 38-41 against another person ('B') is not an offence under that provision if at the time B is 16 or over, and A and B are lawfully married: s 43(1). In proceedings for such an offence, it is for the defendant to prove that A and B were lawfully married at the time: s 43(2). As from a day to be appointed, s 43 is amended so as to refer to civil partners as well as those who are lawfully married: s 43 (prospectively amended by the Civil Partnerships Act 2004 s 261(1), Sch 27 para 175). At the date at which this volume states the law no such day had been appointed.

Conduct by a person ('A') which would otherwise be an offence under any of ss 38-41 against another person ('B') is not an offence under that provision if, immediately before A became involved in B's care in a way that falls within the Sexual Offences Act 2003 s 42, a sexual relationship existed between A and B: s 44(1). Section 44(1) does not apply if at that time sexual intercourse between A and B would have been unlawful: s 44(2). In proceedings for an offence under any of ss 38-41, it is for the defendant to prove that such a relationship existed at that time: s 44(3).

12 A person ('A') commits an offence if: (1) he intentionally causes or incites another person ('B') to engage in an activity; (2) the activity is sexual; (3) B has a mental disorder; (4) A knows or could reasonably be expected to know that B has a mental disorder; and (5) A is involved in B's care in a way that falls within ibid s 42 (see note 11 supra): see s 39; and CRIMINAL LAW, EVIDENCE AND PROCEDURE 11(1) (2006 Reissue) PARA 208.

13 A person ('A') commits an offence if: (1) he intentionally engages in an activity; (2) the activity is sexual; (3) for the purpose of obtaining sexual gratification, he engages in it: (a) when another person ('B') is present or is in a place from which A can be observed; and (b) knowing or believing that B is aware, or intending that B should be aware, that he is engaging in it; (4) B has a mental disorder; (5) A knows or could reasonably be expected to know that B has a mental disorder; and (6) A is involved in B's care in a way that falls within ibid s 42 (see note 11 supra): see s 40; and CRIMINAL LAW, EVIDENCE AND PROCEDURE 11(1) (2006 Reissue) PARA 209.

14 A person ('A') commits an offence if: (1) for the purpose of obtaining sexual gratification, he intentionally causes another person ('B') to watch a third person engaging in an activity, or to look at an image of any person engaging in an activity; (2) the activity is sexual; (3) B has a mental disorder; (4) A knows or could reasonably be expected to know that B has a mental disorder; and (5) A is involved in B's care in a way that falls within ibid s 42 (see note 11 supra): see s 41; and CRIMINAL LAW, EVIDENCE AND PROCEDURE 11(1) (2006 Reissue) PARA 210.

UPDATE

769 Unlawful sexual activity with persons with a mental disorder

NOTE 11--Definition of 'National Health Service body' in the Sexual Offences Act 2003 s 42(5) amended: SI 2007/961.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/7. OFFENCES/770. Assisting patients to absent themselves without leave or to escape.

770. Assisting patients to absent themselves without leave or to escape.

Any person who induces or knowingly¹ assists any other person who is liable to be detained in a hospital² or is subject to guardianship under the Mental Health Act 1983³ to absent himself without leave⁴ commits an offence⁵. Any person who induces or knowingly assists any other person being in legal custody by virtue of the Mental Health Act 1983⁶ to escape from such custody commits an offence⁷.

Any person who in England and Wales or Northern Ireland does anything in relation to a person whose detention in hospital⁸ is authorised by the Mental Health (Care and Treatment) (Scotland) Act 2003 which, if done in Scotland, would make him guilty of an offence⁹ is guilty of an offence¹⁰.

1 Knowledge is an essential ingredient of the offence. As to what constitutes knowledge see *Gaumont British Distributors Ltd v Henry* [1939] 2 KB 711, [1939] 2 All ER 808, DC; *R v Hallam* [1957] 1 QB 569, [1957] 1 All ER 665, CCA. Neglect to make reasonable inquiries is not knowledge, but where a person deliberately refrains from making inquiries the results of which he might not care to have, this constitutes in law actual knowledge of the facts in question: see *Taylor's Central Garages (Exeter) Ltd v Roper* (1951) 115 JP 445 at 449-450, DC, per Devlin J.

2 I.e. within the meaning of the Mental Health Act 1983 Pt II (ss 2-34) (as amended), which includes registered establishments: see PARA 417 ante. As to registered establishments see PARA 421 ante.

3 As to such guardianship see PARAS 469, 502 ante.

4 For the meaning of 'absence without leave' see PARA 507 ante.

5 Mental Health Act 1983 ss 128(1). Any person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both, or on conviction on indictment to imprisonment not exceeding two years or a fine of any amount or both: s 128(4). As to the statutory maximum see PARA 765 note 7 ante. A local social services authority may institute proceedings for an offence under the Mental Health Act 1983 s 128: see s 130; and PARA 431 ante. Section 128 (except so far as it relates to patients subject to guardianship) extends to Scotland: see s 146 (prospectively amended); and PARA 405 ante.

6 I.e. under *ibid* s 137: see PARA 446 ante.

7 *Ibid* s 128(2). As to the penalty, and as to the institution of proceedings, see note 5 supra. As to the meaning of 'knowingly' see note 1 supra. A person detained under the Mental Health Act 1983 who escapes from custody does not thereby commit an offence: see *R v Criminal Injuries Compensation Board, ex p Lawton* [1972] 3 All ER 582 at 584, [1972] 1 WLR 1589 at 1592, DC, per Lord Widgery CJ.

8 I.e. within the meaning of the Mental Health (Care and Treatment) (Scotland) Act 2003 s 329(1): see the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 1(3).

9 I.e. under the Mental Health (Care and Treatment) (Scotland) Act 2003 s 316 (inducing and assisting absconding etc).

10 Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 10(1). Any person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 5 on the standard scale, or on conviction on indictment to imprisonment for a term not exceeding two years or a fine or both: art 10(3). As to the standard scale see PARA 747 note 21 ante.

Where a person is charged with an offence under art 10(1) as it applies to the Mental Health (Care and Treatment) (Scotland) Act 2003 s 316(1)(b) (harbouring a patient), it is a defence for such person to prove that the doing of that with which the person is charged: (1) did not obstruct the discharge by any person of a

function conferred or imposed on that person by virtue of the Mental Health (Care and Treatment) (Scotland) Act 2003 or the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9); and (2) was intended to protect the interests of the patient: art 10(2).

UPDATE

770-771 Assisting patients to absent themselves without leave or to escape, Harbours a patient absent without leave

Repealed: Adult Support and Protection (Scotland) Act 2007 s 74.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/7. OFFENCES/771.
Harbouring a patient absent without leave.

771. Harbouring a patient absent without leave.

Any person who knowingly¹ harbours a patient who is absent without leave² or otherwise at large and liable to be retaken under the Mental Health Act 1983³, or gives him any assistance with intent to prevent, hinder or interfere with his being taken into custody or returned to the hospital or other place where he ought to be, commits an offence⁴.

Any person who in England and Wales or Northern Ireland does anything in relation to a person whose detention in hospital⁵ is authorised by the Mental Health (Care and Treatment) (Scotland) Act 2003 which, if done in Scotland, would make him guilty of an offence⁶ is guilty of an offence⁷.

1 For the meaning of 'knowingly' see PARA 770 note 1 ante.

2 For the meaning of 'absence without leave' see PARA 507 ante.

3 Ie under the Mental Health Act 1983: see PARAS 447, 507 ante.

4 Ibid s 128(3). Section 128 (except so far as it relates to patients subject to guardianship) extends to Scotland: see s 146 (prospectively amended); and PARA 405 ante. As to the penalty, and as to the institution of proceedings, see PARA 770 note 5 ante.

5 See PARA 770 note 8 ante.

6 Ie under the Mental Health (Care and Treatment) (Scotland) Act 2003 s 316 (inducing and assisting absconding etc). Section 316(1)(b) specifically includes harbouring a patient who has done or failed to do anything which results in his being liable to be taken into custody.

7 Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078 (S 9), art 10(1). As to the penalty, and as to a defence, see art 10(2), (3); and PARA 770 note 10 ante.

UPDATE

770-771 Assisting patients to absent themselves without leave or to escape, Harbouring a patient absent without leave

Repealed: Adult Support and Protection (Scotland) Act 2007 s 74.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/7. OFFENCES/772. Obstruction.

772. Obstruction.

Any person who without reasonable cause: (1) refuses to allow the inspection of any premises¹; or (2) refuses to allow the visiting, interviewing or examination of any person by a person authorised in that behalf by or under the Mental Health Act 1983 or to give access to any person to a person so authorised²; or (3) refuses to produce for the inspection of any person so authorised any document or record the production of which is duly required by him³; or (4) otherwise obstructs any such person in the exercise of his functions⁴, commits an offence⁵.

1 Mental Health Act 1983 s 129(1)(a). As to the power to enter and inspect premises under the Mental Health Act 1983 see s 115; and PARA 427 ante. As to the power to enter and inspect the relevant premises of registered establishments under the Care Standards Act 2000 see ss 31-32 (as amended; prospectively amended); paras 421, 432 ante; and SOCIAL SERVICES AND COMMUNITY CARE.

2 Mental Health Act 1983 s 129(1)(b) (amended by the Mental Health (Patients in the Community) Act 1995 s 1(2), Sch 1 para 19). As to rights of visiting, interviewing and examination see the Mental Health Act 1983 s 9(2) (see PARA 474 ante), s 24 (as amended) (see PARA 526 ante), s 31(c) (see PARA 459 ante), s 76 (as amended) (see PARA 566 ante), s 78(2)(g) (see PARAS 576, 583 ante), s 103 (prospectively amended and repealed) (see PARA 747 ante), s 116 (as amended) (see PARA 430 ante). Any person who insists on being present when requested to withdraw by a person authorised to interview or examine a patient in private commits the offence of obstruction: s 129(2). An approved social worker is not authorised to interview a patient in private before making an application under Part II (ss 2-34) (as amended): see s 13(2); and PARA 451 ante. However, a person who disrupts an approved social worker's interview with a patient is guilty of an offence under s 129(1)(d): see the text and note 4 infra.

3 Ibid s 129(1)(c). As to requirements to produce documents and records see s 24(2), (4) (as amended) (see PARA 526 ante), s 76(1)(b) (as amended) (see PARA 566 ante), s 78(2)(g) (see PARAS 576, 583 ante), s 103(6) (prospectively repealed) (see PARA 747 ante).

4 Ibid s 129(1)(d). Obstruction does not necessarily connote physical force; anything which makes it more difficult for a person to carry out his duty may amount to obstruction: see *Borrow v Howland* (1896) 74 LT 787, DC; *Hinchliffe v Sheldon* [1955] 3 All ER 406, [1955] 1 WLR 1207, DC; *Lewis v Cox* [1985] QB 509, [1984] 3 All ER 672, DC. However, standing by and doing nothing does not amount to obstruction unless there is a legal duty to act (see *Swallow v LCC* [1916] 1 KB 224, DC; *Baker v Ellison* [1914] 2 KB 762, DC); nor is a mere refusal to answer questions obstruction (see *Rice v Connolly* [1966] 2 QB 414, [1966] 2 All ER 649, DC). It is an offence to remain if there has been a request to withdraw: see note 2 supra. Giving a verbal warning of an impending inspection may amount to obstruction: see *Green v Moore* [1982] QB 1044, [1982] 1 All ER 428, DC.

5 Mental Health Act 1983 s 129(1). The penalty for these offences, on summary conviction, is imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale or both: s 129(3). As from a day to be appointed, s 129(3) is amended so that the only penalty for these offences is a fine not exceeding level 4 on the standard scale: s 129(3) (prospectively amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 9). At the date at which this volume states the law no such day had been appointed. As to the standard scale see PARA 747 note 21 ante.

A local social services authority may institute proceedings for these offences: see the Mental Health Act 1983 s 130; and PARA 431 ante.

Halsbury's Laws of England/MENTAL HEALTH (VOLUME 30(2) (REISSUE))/7. OFFENCES/773.
Sale of firearm to mentally disordered person.

773. Sale of firearm to mentally disordered person.

It is an offence for any person to sell or transfer any firearm or ammunition to, or repair, prove or test any firearm or ammunition for, any other person whom he knows or has reasonable cause for believing to be of unsound mind¹.

¹ See the Firearms Act 1968 s 25. The penalty for this offence, on summary conviction, is imprisonment for three months or a fine of level 3 on the standard scale or both: s 51(1), Sch 6 Pt I (amended by virtue of the Criminal Justice Act 1982 s 38, 46). See CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 671. As to the standard scale see PARA 747 note 21 ante.